In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION,
and
WYMAN-GORDON COMPANY,
APPELLANTS,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
and
COALITION FOR TAX REFORM, INC.
and UNITED PEOPLES, INC.,
APPELLEES.

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

JURISDICTIONAL STATEMENT

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Opinion Below

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts (App. A) is reported at Mass. Adv. Sh. (1977) 134, — N.E.2d —.

Jurisdiction

Appellants brought this action in the Single Justice session of the Supreme Judicial Court for the Commonwealth of Massachusetts seeking, *inter alia*, to have declared unconstitutional Massachusetts General Laws c. 55, § 8 ("Section 8") on its face and as applied to plaintiffs insofar as it prohibited plaintiffs from expending or contributing any monies to defeat a proposed constitutional amendment submitted to the voters at the general election on November 2, 1976. The complaint sought relief on the grounds that Section 8 violated the First and Fourteenth Amendments to the United States Constitution.

After the parties entered into a Statement of Agreed Facts (App. F),[1] the case was reserved and reported by the Single Justice to the Full Court without decision. After argument, the Court issued an Order (App. B) on September 22, 1976, denying appellants all relief and on September 28, 1976, judgment was entered (App. C). The opinion of the Court entered February 1, 1977.

Appellants filed a timely notice of appeal with the clerk of the Supreme Judicial Court on September 29, 1976. (App. D). Appellants' motion for a stay or injunction pending appeal was denied by the Supreme Judicial Court on September 30, 1976 (App. E) and by this Court on October 6, 1976. The time for docketing this appeal was extended to February 25, 1977, on December 8, 1976.

The Jurisdiction of this Court is conferred by 28 U.S.C. § 1257(2). *Commonwealth Bank* v. *Griffith*, 39 U.S. 55 (1840).

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[1] Exhibit D to the Statement of Agreed Facts, 65 pages of financial reports filed in a previous election by a previously existing political committee, has been omitted from the Statement, App. F, since such reports are not relevant to this Court's jurisdiction.

Statute Involved

The text of Mass. Gen. Laws c. 55, §8, the validity of which is involved in this action, is set forth below:

> No corporation carrying on the business of a bank, trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, *no business corporation* incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, *shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of* aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or *influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.* No person or persons, no political committee, and no person acting under the authority of a political committee, or in its behalf, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay, expend or contribute for any such purpose.

Any corporation violating any provision of this section shall be punished by a fine of not more than fifty thousand dollars and any officer, director or agent of the corporation violating any provision thereof or authorizing such violation, or any person who violates or in any way knowingly aids or abets the violation of any provision thereof, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both. 6 Mass. Gen. Laws Ann. 50 (pocket part) (emphasis added).

Questions Presented

1. Whether the appeal is moot because the November 2, 1976 election has passed.

2. Whether Section 8, insofar as it forbids a business corporation from contributing or expending any monies to communicate its views in opposition to a ballot question solely concerning taxation of individual income, absent a demonstration by the corporation that the proposed ballot question does, in fact, materially affect its business, property or assets, is invalid as a denial of freedom of speech.

3. Whether the words "materially affecting any of the property, business or assets of the corporation" as used in Section 8 are so vague as to deprive appellants of their liberty or property without due process of law in violation of the Fourteenth Amendment.

4. Whether Section 8 denies appellants equal protection of the law in that:

a. it prohibits corporate expenditures, and thus corporate expression of views, pertaining to an individual income tax ballot question but does not prohibit corporate expenditures pertaining to other ballot questions, thus creating a classification based solely upon the content of the expression;

b. it prohibits business corporations, but not labor unions, partnerships, business trusts or others similarly situated, from expending funds to oppose ballot questions solely concerning individual income taxes.

5. Whether the provision in Section 8, a criminal statute, that no question concerning solely the taxation of individuals "shall be deemed materially to affect" the business of a corporation is an irrebuttable presumption which deprives appellants of liberty or property without due process of law.

Statement of the Case

Appellants are five business corporations (two banks, two scientific/technical concerns, and a business engaged in the development, manufacturing and sale of consumer products and services) who wished to expend monies in opposition to a proposed state constitutional amendment submitted to the voters at the general election on November 2, 1976. The amendment, as it appeared on the ballot, proposed that the Legislature be granted the authority to impose a graduated tax on individual income.[2] The defendant, Attorney General of the Commonwealth, indicated that he would prosecute the appellants pursuant to Section 8 should they expend funds to publicize their views on the proposed amendment to the general public. Appellants then sought declaratory relief.

The Statement of Agreed Facts stipulates that each of the appellants intended to expend monies to publicize their opposition to the proposed constitutional amendment and that the management of appellants believed that the proposed constitutional amendment would affect adversely

[2] At present, the Massachusetts state constitution permits only flat-rate taxation upon individual income. Mass. Const., Amend. Art. 44.

their business and property by discouraging persons of high ranking executive and middle management ability and engineering and technical specialists from settling or remaining in Massachusetts, by tending to reduce the individual savings account balances maintained at the appellant banks, as well as their individual and industrial loan portfolios, by discouraging business from settling or remaining in Massachusetts, and by shrinking the disposable income available for the purchase of consumer products. (App. F, 33-37). It was further stipulated that there is a division of opinion among economists as to whether and to what extent a graduated income tax imposed solely on individuals would affect the business and assets of corporations. (App. F, 33).

Appellants argued below that the outright prohibition against corporate expenditures or contributions relating to an individual income tax ballot question violated their First Amendment right to freedom of expression. The Court responded that only when a general political issue materially affects a corporation's assets may that corporation claim First Amendment protection for its speech entitling it to communicate its position on that issue to the general public (App. A, 13), and that Section 8 was not invalid as to the plaintiffs since they had failed to demonstrate that the proposed amendment does in fact materially affect their business. (App. A, 14).

Appellants also argued that the statute was impermissibly vague. With respect to the words "materially affects" the Court noted that the term is general in nature, but that the prohibition against corporate expenditures on a ballot question solely concerning individual income tax is precise and definite. (App. A, 19).[3]

[3] Appellants also argued that other language in the statute was vague and that Section 8 was overbroad. The Court narrowed the definition of "expenditure" and held that Section 8 does not proscribe communications to shareholders or employees or the publication of views in an in-house newspaper. The overbreadth and vagueness questions, except with respect to the vagueness of the phrase "materially affects", are not raised on appeal.

In response to appellants' contention that Section 8 deprived them of equal protection of the laws, the Court applied the "rational basis" test accorded to economic matters and concluded that business corporations could be treated differently from labor unions because corporations have shareholders, and that they could be treated differently from other business entities with shareholders because the Legislature may have concluded that such entities did not present the same type of problem. (App. A, 22-23).

Finally appellants argued that Section 8 created an impermissible, irrebuttable presumption of fact in a criminal statute concerning the materiality of an individual income tax question upon corporate assets. The Court held that there were two separate crimes in Section 8, one being the general crime of expending funds on questions not materially affecting a corporation's assets and the other being the crime of expending funds on a question dealing solely with individual taxes. With respect to the second crime, the Court held that materiality was not an element of the crime, and, therefore, that the language in Section 8 stating that such questions are not to be deemed material was not a presumption. (App. A, 24).

On November 2, 1976, the proposed constitutional amendment was defeated at the polls. (App. A, 4 n.6).

The Questions Are Substantial

The constitutional questions in this case affect countless business corporations throughout Massachusetts. The fundamental First Amendment rights of these corporations to express their views on political questions which their management believes may materially affect their business, and the fundamental First Amendment rights of the public to hear the views which these corporations wish to express, are affected by the decision below.

I. The Action Is Not Moot

The event precipitating appellants' request for relief—the placement of a proposed constitutional amendment on the November, 1976 ballot—has ended. Nevertheless, under the standards articulated by this Court, the appeal is not moot.

The appeal falls within that class of cases "capable of repetition, yet evading review" which, if not heard after the specific underlying dispute has terminated, will never be able to be reviewed by this Court. *Southern Pacific Terminal* v. *ICC,* 219 U.S. 498, 515 (1911). In *Weinstein* v. *Bradford,* 423 U.S. 147, 149 (1975) (per curiam), the Court set forth, as follows, the two elements which, if found in a case other than a class action, will satisfy the "capable of repetition, yet evading review" doctrine: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." The instant case satisfies both elements.

A. *The Same Controversy Will Recur*

Section 8 imposes an outright ban on all corporate expenditures for the purpose of influencing the vote on questions solely concerning individual taxation. The Supreme Judicial Court has ruled that the provision would be invalid only if a corporation has proven that a proposed individual income tax question does in fact materially affect its business. (App. A, 14). The Court specifically noted that "reasonable belief" that a proposed question would materially affect a corporation is not sufficient. (App. A, 15 n.15). Thus, when appellants renew their challenge to the statutory prohibition before the next election, it necessarily will entail litigation.

The 1976 election marked the fourth time in recent years that a proposed graduated income tax ("GIT") amendment has been submitted to the Massachusetts voters by ballot question. The Massachusetts Constitution requires that any proposed constitutional amendment pass both houses of the Legislature in two consecutive sessions before appearing on the ballot. Mass. Const., Amend. Art. 48, IV §§4, 5. This procedure was followed in the 1962, 1966, 1972, and 1976 elections.[4] Each time the voters rejected the pro-

[4] In a joint session of the two branches held on May 13, 1959, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1962 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 143 affirmative votes and 118 negative votes. Journal of the Senate 848-51 (1959). It was approved a second time by the Legislature on March 29, 1961, when the proposed amendment received 144 affirmative votes and 121 negative votes. Journal of the Senate 717-20 (1961).

In a joint session of the two branches held on August 30, 1966, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1968 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 188 affirmative votes and 46 negative votes. Journal of the Senate 1678-81 (1966). It was approved a second time by the Legislature on May 10, 1967, when the proposed amendment received 174 affirmative votes and 78 negatives votes. Journal of the Senate 1121-23 (1967).

In a joint session of the two branches held on July 2, 1969, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1972 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 204 affirmative votes and 49 negative votes. I Journal of the Senate 1586-90 (1969). It was approved a second time by the Legislature on May 12, 1971, when the proposed amendment received 245 affirmative votes and 20 negative votes. I Journal of the Senate 1290-94 (1971). (App. F, 40-41).

In a joint session of the two branches held on August 15, 1973, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1976 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 199 affirmative votes and 66 negative votes. II Journal of the Senate 2126-29 (1973). It was approved a second time by the Legislature on May 7, 1975, when the proposed amendment received 228 affirmative votes and 41 negative votes. I Journal of the Senate 1409-12 (1975).

posal, but as note four indicates, the Legislature continues, by lopsided margins, to place the issue on the ballot. Moreover, several politically influential groups have advocated in the past and undoubtedly will continue to press for passage of a GIT. (App. F, 46). In fact, a bill now is pending in the Legislature to enact a GIT. (App. G). It would take effect upon approval by the voters of a constitutional amendment.

Section 8 imposes a continuing statutory obstacle to spending monies in opposition to a GIT ballot question.[5] The Attorney General, whether the present incumbent or a successor, will enforce the statute. State policy "is not contingent upon executive discretion." *Super Tire Engineering Corp.* v. *McCorkle*, 416 U.S. 115, 124 (1974). Unlike the situation in *Spomer* v. *Littleton*, 414 U.S. 514 (1974), appellants are not challenging the behavior of a particular state's attorney. Even in cases, unlike the present one, where there is no statute which effectively precludes discretion, this Court has been willing to assume that the appropriate authorities would apply the law. *E.g., Nebraska Press Ass'n* v. *Stuart*, 96 S.Ct. 2791, 2797 (1976) (case law authorizing prosecutors to seek restrictive orders meant such orders would be sought and thus case not moot).

Finally, there is a reasonable likelihood that the same complaining parties again will be subjected to the same statutory prohibition. All the complaining parties believed

[5] Corporate expenditures and contributions for political matters have been prohibited or restricted since 1907. St. 1907 c. 576, §22. In 1938 corporations were allowed to spend monies as to a ballot question "affecting" the corporate property, business or assets, St. 1938 c. 75, and in 1943 this was revised to require that the question "materially affect" the same. St. 1943 c. 273, §1. Lustwerk v. Lytron, Inc., 344 Mass. 647, 652, 183 N.E.2d 871 (1962). This provision compels a demonstration by the corporation of materiality in fact according to the Court below. (App. A, 13). The tailor-made prohibition against GIT expenditures dates from 1972 (App. A, 6) and now provides that no ballot question solely concerning individual taxation shall be deemed to have such a material effect.

that a graduated individual income tax would materially affect their business and all wished to spend funds to oppose the GIT constitutional amendment in 1976. The very fact that they are seeking plenary review before this Court after the election has passed indicates their continuing purpose to secure the right to expend funds in future elections. Moreover, the record indicates that four of the five appellants contributed funds in 1972 in opposition to the proposed GIT constitutional amendment which appeared on the 1972 ballot. (App. F, 35, 36, 37). It may be inferred that they contributed in earlier GIT campaigns. *See Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 183 N.E.2d 871 (1962). Unlike the situations presented in *Weinstein* v. *Bradford, supra*, 423 U.S. at 149 (highly improbable that released convict would once again acquire status of parolee), or *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974) (virtually impossible that final term law school student would once again acquire status of law school applicant), in the instant case there is more than a reasonable probability that the same complaining parties will again believe themselves to be unconstitutionally restricted by Section 8.

B. *The Time Frame Will Preclude Review*

Appellants, in order to avoid "ripeness" problems, may not bring a new action until it is clear that a GIT constitutional amendment will appear on the ballot. *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 72-75 (1974); *O'Shea* v. *Littleton*, 414 U.S. 488, 495-98 (1974). Passage twice through both houses of the Legislature is time-consuming, and past experience indicates that the process will not be completed until approximately 18 months prior to the next election. *See* note four, *supra*.

In 1976 appellants presented their case by means of a statement of agreed facts. The opinion below held that the absence of a finding that these corporations would, in fact,

be materially affected by the ballot question was fatal to appellants' constitutional contentions. Since the Attorney General obviously will not stipulate to this material effect (having prevailed in this case on precisely that point), appellants will be faced with proving the material effect at trial. The trial and review process cannot be completed within 18 months.[6]

After a trial on the merits, and the issuance of a written decision, these appellants would face review by the Massachusetts Appeals Court and then the Supreme Judicial Court before an appeal could be taken to this Court. Appellants could under no foreseeable circumstances obtain plenary review before this Court in sufficient time to be able to expend funds in a meaningful fashion in advance of the vote. *E.g., Roe* v. *Wade,* 410 U.S. 113 (1973).

Of course, appellants' contention on the present appeal is that the imposition of such a burdensome course on the exercise of the right to express an economic and political viewpoint is unconstitutional. That issue is presented on the present record. If it is not resolved by this Court now, it will never be resolved.

C. *Election Cases*

This Court, applying the *Southern Pacific Terminal* "capable of repetition, yet evading review" standard,

[6] In Suffolk County, where the instant case originated, the average time from date of entry to trial in Superior Court is 56 months; the average time in all other counties is 43 months. 19 Annual Report to the Justices of the Supreme Judicial Court 64 (June 30, 1975).

The instant case was commenced in the Single Justice session of the Supreme Judicial Court. This process is quite compatible with a relatively expeditious handling of a case upon an agreed statement. Where the prospect is for a hotly contested trial, presumably consuming days or weeks with the testimony of economic experts on whether and to what extent future individual tax rates may impact on corporate business, the case will be processed through the Superior Court, the trial court of the Commonwealth.

has repeatedly sustained its jurisdiction in election cases although the specific election underlying the action has passed. *E.g., American Party* v. *White,* 415 U.S. 767, 770 n.1 (1974); *Rosario* v. *Rockefeller,* 410 U.S. 752, 756 n.5 (1973); *Dunn* v. *Blumstein,* 405 U.S. 330, 333 n.2 (1972); *Moore* v. *Ogilvie,* 394 U.S. 814, 816 (1969).[7] "In these cases [individual challenges to state election laws after the elections had taken place] the Court recognized the importance of the issues to candidates and voters who would participate in future elections and accepted jurisdiction under the *Southern Pacific* rationale without reference to the absence of a formal class action." Note, *The Mootness Doctrine In The Supreme Court,* 88 Harv. L. Rev. 373, 388 (1974).

Guidance on the resolution of the mootness question posed by the instant case may be found in this Court's discussion in *Storer* v. *Brown,* 415 U.S. 724, 737 n.8 (1974) (challenge to state election laws relating to placement of independent candidates on the California ballot):

> The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is "capable of repetition, yet evading review." [Citations omitted.] The "capable of repetition, yet evading review" doctrine, in the context of election cases, is appropriate when there are "as applied" challenges as well as in the more typical case involving

[7] In those election cases in which mootness claims have been sustained, factors other than the mere passing of the election were determinative. Brockington v. Rhodes, 396 U.S. 41, 43 (1969) ("limited nature of the relief [mandamus] sought"); Hall v. Beals, 396 U.S. 45 (1969) (intervening change in state law); Golden v. Zwickler, 394 U.S. 103 (1969) (Congressman, target of anonymous handbills, elected to bench).

Union, Inc.). It has long been established that corporations are "persons" within the meaning of the Fourteenth Amendment, *e.g., Covington & Lexington Turnpike Rd. Co.* v. *Sandford,* 164 U.S. 578, 592 (1896), and there are numerous cases holding that profit-making corporations are entitled to freedom of expression. *E.g., Doran* v. *Salem Inn, Inc.,* 422 U.S. 922 (1975); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Grosjean* v. *American Press Co.,* 297 U.S. 233, 244 (1936). *Cf. Eastern Ry. Conf.* v. *Noerr Motors,* 365 U.S. 127, 137-39 (1960).

Moreover, this Court has consistently asserted that the right of the listener to hear is at least equally precious as the right to speak. *E.g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 756 (1976); *Bigelow* v. *Virginia,* 421 U.S. 809, 822 (1975); *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969). "Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues." *Buckley* v. *Valeo, supra,* 424 U.S. at 49 n.55. Since the voters' ability to hear the views of corporations is "inextricably meshed" with the appellants' right to speak, the appellants may assert those rights on behalf of the voters. *Procunier* v. *Martinez,* 416 U.S. 396, 409 (1974). *See also Madison* v. *Wisconsin Employment Relations Comm'n,* 97 S.Ct. 421, 426 n.7 (1976). The decision of the court below does not respond to appellants' contention that the public's right to know necessarily is suppressed by the drastic limits in Section 8 imposed on a corporation's ability to communicate.[8] Since the voters'

[8] Perhaps the argument was ignored because the Massachusetts Court assumed that corporations could communicate effectively without expending money. (App. A. 17). This assumption is directly contrary to this Court's premise that "virtually every means of communicating ideas in today's mass society requires the expenditure of money." Buckley v. Valeo, 424 U.S. 1, 19 (1976).

only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

Appellants submit that under the principles articulated in *Storer,* this action is not moot. At the very least, the mootness question itself is sufficiently substantial to warrant fuller consideration in briefs on the merits.

II. Section 8 Violates First Amendment Rights Afforded Appellants by Virtue of the Fourteenth Amendment

A state criminal statute prohibiting all contributions or expenditures on one political question absent proof by the corporate speaker of the material effect of that question on its assets operates as a prior restraint upon freedom of expression and comes to this court "bearing a heavy burden against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963). Two courts recently have invalidated on First Amendment grounds restrictions on corporate expenditures or contributions relating to ballot questions. *C & C Plywood Corp.* v. *Hanson,* 420 F. Supp. 1254 (D. Mont. 1976), *appeal docketed,* No. 76-3118, 9th Cir., September 29, 1976; *Pacific Gas & Electric Co.* v. *Berkeley,* 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976).

There is no doubt that Section 8, which prohibits all contributions or expenditures by corporations on any political question relating to individual taxation, could not survive a constitutional challenge if it were extended to individuals or non-profit corporations. *Buckley* v. *Valeo,* 424 U.S. 1 (1976) (prevailing parties included incorporated political groups such as the New York Civil Liberties

right to be well-informed is paramount, the distinction between corporations and individuals as the source of speech is constitutionally irrelevant.

The Court below recognized that Section 8 " 'operate[s] in an area of the most fundamental First Amendment activities' ". (App. A, 10). With respect to appellants' First Amendment claims, it held as follows:

> [W]e hold today that only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public. (App. A, 13).
>
> . . .
>
> The statutory prohibition can only be invalid as to the plaintiffs if they have demonstrated that the proposed amendment does in fact materially affect their business. The plaintiffs have not made such a showing. (App. A, 14).

The Court applied a limit upon corporate freedom of expression—proof that the subject matter is material to the speaker—hitherto unrecognized by any case law.

A. *The Holding Below That Appellants Must Affirmatively Prove Materiality Before Acquiring First Amendment Protection Has No Support in the Decisions of This Court*

The Statement of Agreed Facts specifies that the management of each of the appellants believed that the corporations' interests would be affected materially[9] by the pro-

[9] The agreed facts clearly reveal that this belief is reasonable. For example, appellant banks have literally billions of dollars on loan to, and in deposits from, both individuals and corporations and the appellants' combined payroll comprises over 20,000 employees covering all income levels. (App. F, 32-37). The tax climate in the State would seem to be a matter for their reasonable concern. The Court held that a reasonable belief as to materiality would not suffice, however. (App. A, 15 n.15).

posed constitutional amendment, and that economists disagree as to the impact of a graduated individual income tax upon corporations. (App. F, 33). Whether or not appellants' prediction is sound, whether or not their views are as worthy as those of the proponents of the tax—such questions are not relevant in a constitutional republic. By requiring appellants to demonstrate materiality in fact, particularly in view of the criminal sanctions attached to violation of the statute,[10] Section 8 operates as a prior restraint upon freedom of expression. *Cf. United States* v. *CIO*, 335 U.S. 106, 153 (1948) (Rutledge, J., concurring). Appellants are aware of no decision requiring proof of a direct financial interest in the topic of speech as a prerequisite to speech. The proposition that only corporations engaged in the business of communicating may speak without first demonstrating materiality sets media corporations on a pedestal not recognized by the First Amendment. *E.g., Branzburg* v. *Hayes*, 408 U.S. 665, 684 (1972) ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."); *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 390 (1968) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."); *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967) ("Those guarantees are not for the benefit of the press so much as for the benefit of all of us."). After this Court's decision in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, supra*, there can be no doubt

[10] If a corporation is criminally prosecuted under Section 8 for spending money in opposition to the proposed constitutional amendment, the prosecution need not prove lack of materiality in order to secure a conviction. (App. A, 24).

that the right to hear and the correlative right to speak extend to corporate commercial advertisements. The decision in *Virginia State Board* leaves no room for a state statute to prohibit drug price advertising merely because an advertising pharmacy has failed to prove at trial that the advertisement will actually result in greater sales.

Conditioning the right to speak upon a demonstration of factual materiality impermissibly burdens freedom of expression. Moreover, in the context of this case, the burden is almost impossible to satisfy, and thus operates as a total prohibition. The materiality of an amendment authorizing, but not requiring, graduated individual income taxation, is dependent upon unknown and essentially unknowable future legislative tax enactments. What the graduated rate may be ten or fifteen years hence is impossible to know but would be relevant as to the future impact on the corporate community. Indeed, the Attorney General admitted that materiality could not be proven:

> This Court would have to engage in pure speculation as to the type of tax, the gradation and the extent of the tax that would be imposed before it could determine whether it would more likely than not have a material effect.[11]

Furthermore, even if the issue were capable of judicial resolution, a finding as to materiality most likely could not be made within the relatively short time span between knowledge that a proposed constitutional amendment will appear on the ballot and the election itself. The necessity to engage in costly litigation when a corporation reasonably believes its business to be materially affected is an undue burden upon its First Amendment rights. "[E]ven when pursuing a legitimate interest, a State may not choose

[11] Brief of the Defendant, p. 66.

means that unnecessarily restrict constitutionally protected liberty." *Kusper* v. *Pontikes,* 414 U.S. 51, 58-59 (1973). "Inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." *Lamont* v. *Postmaster General,* 381 U.S. 301, 309 (1965) (Brennan, J., concurring) (Requirement that an addressee notify the Post Office of his desire to receive mail unconstitutional because almost certain to have a deterrent effect). *See also Cantwell* v. *Connecticut,* 310 U.S. 296, 307 (1940) (Statute prohibiting solicitation for religious or charitable purpose absent determination by secretary of public welfare that cause is religious or charitable constitutes an unconstitutional restraint, "a forbidden burden upon the exercise of liberty protected by the Constitution.")

B. *The Total Prohibition On Corporate Expenditures or Contributions Relating to Any Ballot Question Solely Concerning Individual Taxation Serves No Compelling or Rational State Interest*

Despite the holding that a corporation would have First Amendment protection for its speech were its business materially affected, the Court below declined to examine whether the governmental interests advanced by the State could satisfy the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley, supra,* 424 U.S. at 44-45. Instead it held as follows: "We cannot say that there was no rational basis for this legislative determination [that no question concerning taxation of individuals shall be deemed materially to affect corporate assets]." (App. A, 14) (emphasis added).[12]

[12] The nature of the "rational basis" is not indicated in the opinion.

Incidental restrictions upon the exercise of First Amendment rights may be imposed in furtherance of a legitimate governmental interest unrelated to suppression of free expression if the restriction is no greater than necessary to further that interest. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). Section 8 is not merely an incidental restriction. Its sole effect is to restrict or prohibit communication. The governmental interest advanced below, namely preventing corporations from "drowning out" the voices of the proponents of the proposed constitutional amendment, is aimed precisely at suppression of free expression. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ." *Buckley, supra,* 424 U.S. at 48-49. *See also, Madison* v. *Wisconsin Employment Relations Comm'n, supra,* 97 S.Ct. at 426. Moreover, unlike contributions to candidates, informational corporate messages relating to ballot questions cannot corrupt the electoral process. *Schwartz* v. *Romnes*, 495 F.2d 844, 851 (2d Cir. 1974).

Section 8 bars corporate communications to the public as to the wisdom of a GIT but does not bar lobbying—communications to legislators—as to a GIT after the constitution is amended to allow a GIT to be passed. Furthermore, while forbidding communications to the public the statute, as interpreted below, it would not forbid communications with shareholders or employees. Section 8 allows unlimited corporate expenditure as to some ballot questions but completely forbids communications as to other questions. The statute may thus be seen as differentiating among speakers based upon the form of their organization (corporate versus partnership, union, etc.), the identity of their audience, and the content of the communication itself for no intelligible, much less compelling, governmental purpose.

Section 8 cannot be justified on the grounds that the Legislature may determine what is *ultra vires.* The right of corporations to communicate stems from the Fourteenth Amendment. While the state may regulate the affairs of a corporation, it may not impose unconstitutional conditions. *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922). *Cf. Craig v. Boren*, 97 S.Ct. 451 (1976) (state's broad power under the Twenty-First Amendment to regulate alcohol cannot justify gender-based discrimination). Moreover, the Attorney General conceded that the state's interest was not in preventing corporate waste, but in "protecting shareholders whose political, as opposed to business interests, may be in direct conflict with the political position of the corporation."[13] Finally, the total prohibition against both contributions and expenditures is not the least restrictive alternative.[14]

In view of the impermissible nature of the governmental interests advanced and the burden imposed upon appellants' freedom of expression, substantial federal questions are raised.[15]

III. The Phrase "Materially Affecting" Fails To Meet the Required Standard of Definiteness

Appellants argued below that the term "materially affecting" was unduly vague and that the uncertainty of having to demonstrate materiality would have a chilling effect upon the exercise of their First Amendment rights. The Court responded as follows:

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[13] Defendant's brief, pp. 74-75.

[14] The Court below noted this Court's distinction in Buckley between contributions and expenditures, but concluded, with little explanation, that "it does not appear to be a relevant one", (App. A, 10 n.11) presumably on the assumption that only corporations which prove material effect have a constitutional right to make either.

[15] No independent state ground appears in the Court's opinion.

> We recognize that the "materially affects" limitation is general in nature; but we also note that the statutory proscription in question here—the prohibition against corporate expenditures on a referendum question *solely* concerning a personal GIT—is both precise and definite. (App. A, 19).

Where appellants attacked the statutory proviso that a personal GIT ballot question "shall not be deemed" materially to affect corporate assets, the Court held that if appellants had proved that the ballot question did "materially affect" their assets the proviso would "be invalid as to the plaintiffs." (App. A, 14). Yet where appellants attacked the "materially affecting" standard itself as being unconstitutionally vague, the Court held that the standard was saved from vagueness by the statutory proviso.

Due process requires that a penal statute not employ terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 296 U.S. 385, 391 (1926). Where, as here, economists disagree among themselves as to the particular question, it is hard to conceive how the standard would be clear to "men of common intelligence." Furthermore, the "general test of vagueness applies with particular force in review of laws dealing with speech." *Hynes* v. *Oradell*, 425 U.S. 610, 620 (1976). In the instant case the vagueness of the legislative standard has had a substantial deterrent effect in that the appellants felt effectively muzzled despite their reasonable belief that their interests were materially affected by the proposed constitutional amendment.

IV. The Section 8 Prohibition Is Invalid as an Unconstitutional Denial of Equal Protection of the Laws

Because the statutory classification affects First Amendment rights, strict scrutiny is required. *Police Dept.* v. *Mosley*, 408 U.S. 92, 99 (1972) (anti-picketing ordinance which exempted peaceful labor picketing held invalid under Equal Protection clause). A statute affecting fundamental rights is judged by "the stricter standard of whether it promotes a *compelling* state interest," *Shapiro* v. *Thompson*, 394 U.S. 618, 638 (1969), and it will not be afforded the usual presumption of constitutionality. *See, e.g., Kramer* v. *Union Free School District*, 395 U.S. 621, 628 (1969). The Court below recognized that the statute operated in "'an area of the most fundamental First Amendment activities'" (App. A, 10), but because it found the statute was not actually prohibited by the First Amendment it reverted to "traditional scrutiny involving economic matters" when reviewing Section 8 for equal protection purposes. (App. A, 22). The Court did not apply strict scrutiny nor did it find a compelling state interest.[16]

The Court thus misconceived its task. Application of these equal protection principles is not dependent upon a finding that the challenged statute is unconstitutional under the First Amendment. *See Young* v. *American Mini-Theatres, Inc.*, 96 S.Ct. 2440 (1976). Indeed, if a statute is found unconstitutional on First Amendment grounds there is no reason to consider the merits of equal protection attacks. The proper frame of reference is whether or not the

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[16] The opinion may reflect an incipient trend on the part of the Supreme Judicial Court. *See* Commonwealth v. 707 Main Corp., Mass. Adv. Sh. (1976) 2643, 2649-51, 357 N.E.2d 753 (since the particular movie is obscene and not entitled to First Amendment protection Court applies "rational basis" test to defendant's equal protection argument).

statute operates in an area of fundamental rights. If it does, the classifications embodied in the statute must serve a compelling interest.

The statutory proviso, forbidding corporations from communicating as to ballot questions relating to individual taxes but not forbidding communications as to other questions, discriminates impermissibly on the basis of the content of speech, as does Section 8 in its broader aspect, by forbidding communications as to ballot questions which do not "materially affect" the corporation but not limiting communications as to ballot questions which do "materially affect" them. *See Mosley, supra.* Whatever may be the scope of permissible content-based regulation, *see Young* v. *American Mini-Theatres, Inc., supra,* no decision of this Court justifies regulating political speech topic by topic.

Appellants also argued that the statute must fail because of its under-inclusive nature. The court justified the statute's failure to encompass labor unions, business trusts, partnerships, and other such entities, on three grounds: 1) Legislative desire to protect shareholders against *ultra vires* activities; 2) the Legislature may have concluded that other entities did not present the same type of problem; and 3) ability of the Legislature to proceed one step at a time. (App. A, 22-23). The last two arguments were advanced only with respect to those non-corporate entities which also have shareholders, such as real estate investment trusts.[17]

The *ultra vires* rationale is hard to follow. Section 8, as construed, prohibits corporate expenditures or contributions for matters which management reasonably believes will materially affect the corporation. Forbidding all commentary to the public yet allowing unlimited commentary to legislators is irrational. Furthermore, as far as *ultra vires* questions are concerned, the fact that unions lack shareholders is not a rational explanation for failing to include them in the same statutory scheme that regulates corporate political expenditures in view of this Court's recognition, in *Cort* v. *Ash,* 422 U.S. 66, 81 n.13 (1975), that union members may need *greater* protection against potential misuse of funds.

[17] There are 7500 real estate trusts in Massachusetts. (App. F. 40).

With respect to the other two legislative interests cited by the Court, those pertaining to other business entities with shareholders, the justifications are even weaker. What the "type of problem" is that might have been peculiar to corporations was not identified, but presumably the Court was referring to the "undue influence" argument made by the Attorney General. This Court has rejected the propriety of a governmental interest in balancing voter exposure to political debate. *Buckley* v. *Valeo, supra,* 424 U.S. at 44-45. Nor can the ability to proceed "one step at a time" justify an otherwise irrational classification, particularly since the statute has addressed such questions since 1907. Other than an impermissible interest in attempting to secure approval of the proposed constitutional amendment, there is no substantial relationship between the classification and the object of the legislation. *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). Furthermore, the Legislature failed to utilize less restrictive alternatives to achieve any permissible goals. *McLaughlin* v. *Florida,* 379 U.S. 184, 196 (1964). Clearly it has demonstrated no state interest sufficiently "compelling" to survive strict scrutiny.

V. Section 8 Incorporates an Irrebutable Presumption of Fact Concerning the Materiality of Ballot Questions Solely Concerning Individual Taxation Which Is Unreasonable and Violative of Due Process.

Before the 1972-1973 amendments, Section 8 provided that no business corporation could spend money to influence the vote on any question other than one materially affecting its assets. To obtain a criminal conviction the prosecutor would have to prove non-materiality. The amendment challenged by appellants provides that no question solely concerning individual taxation "shall be deemed materially to affect" a corporation's assets. The Court below concluded that there was no presumption, not because the prosecutor still would be required to prove non-materiality, but because materiality is not an element of the "separate crime" of spending on a question solely concerning individual taxation. (App. A, 24 n. 19). Nevertheless the statute clearly creates one crime and makes materiality an essential element of that crime. Since the Court below itself held that a prohibition against spending as to the proposed amendment would be unconstitutional if appellants were affected materially, its holding that the prosecutor need not prove non-materiality accomplishes, at the most, nothing more than turning an unconstitutional irrebuttable presumption into an unconstitutional rebuttable presumption. Where the statute imposes criminal penalties, the State must bear the burden of proving guilt. *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Tot* v. *United States*, 319 U.S. 463 (1943). The irrational presumption in Section 8, a criminal statute which impinges upon First Amendment freedoms, should be struck down as a violation of the Due Process clause.

Conclusion

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION,
and
WYMAN-GORDON COMPANY,
APPELLANTS,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
and
COALITION FOR TAX REFORM, INC.
and UNITED PEOPLES, INC.,
APPELLEES.

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

AT BOSTON, February 1, 1977.

IN THE CASE OF SJC-653

THE FIRST NATIONAL BANK OF BOSTON
& others
vs.
ATTORNEY GENERAL & others

pending in the Supreme Judicial Court for the County of Suffolk No. 76-109 CIV.

ORDERED, that the following entry be made in the docket; viz.,—

See order entered on September 22, 1976.

BY THE COURT,

/s/ FREDERICK J. QUINLAN, Clerk.

February 1, 1977

S-653 S.J.C.

THE FIRST NATIONAL BANK OF BOSTON & others[1]
vs. ATTORNEY GENERAL & others[2]

LIACOS, J. The plaintiffs brought a declaratory judgment proceeding under G.L. c. 231A alleging that they intended to expend moneys to publicize, by newspaper advertisements and other similar methods, their views with respect

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[1] New England Merchants National Bank, The Gillette Company, Digital Equipment Corporation, and Wyman-Gordon Company.

[2] Coalition for Tax Reform, Inc., and United Peoples, Inc., interveners.

to a proposed constitutional amendment which was to be submitted to the voters as a referendum question at the general election on November 2, 1976. The proposed amendment, set out in the margin,[3] would permit, but not require, the Legislature to modify the income tax laws of the Commonwealth by imposing a graduated tax on the income of individuals (GIT). The Attorney General (the original defendant herein) indicated that he would prosecute the plaintiffs under the provisions of G.L. c. 55, § 8, as appearing in St. 1975, c. 151, §1,[4] if they were to expend moneys to

[3] "Article of Amendment. Art. As an alternative to levying a tax on income in the manner provided in Article XLIV of the Amendments to the Constitution, the General Court shall have full power and authority to levy a tax on personal incomes at rates which are graduated according to the total amount of income received, regardless of the sources from which it may be derived, and to grant reasonable exemptions, deductions, credits and abatements to such tax. Further, the General Court may define the tax liability or the total income upon which such tax is levied or the graduated rates at which it is taxed by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time and may prescribe reasonable exceptions to and modifications of such provision."

[4] Section 8 provides: "No corporation carrying on the business of a bank, trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, no business corporation incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters *solely* concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation. No

publicize their views on the proposed amendment to the general public. The plaintiffs sought a declaration that § 8 is unconstitutional on its face and as applied to them. They began this action by filing a complaint with the clerk of the Supreme Judicial Court for the county of Suffolk. The matter was heard before a single justice who permitted two groups to intervene as additional parties defendant[5] and reserved and reported the case to the full court. The matter was argued before this court on June 8, 1976. Due to the pendency of the election and the significance of the questions raised by this proceeding, an order of this court without opinion was entered on September 22, 1976, and judgment pursuant thereto was entered by the single justice on September 28, 1976.[6]

person or persons, no political committee, and no person acting under the authority of a political committee, or in its behalf, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay, expend or contribute for any such purpose [emphasis supplied].

"Any corporation violating any provision of this section shall be punished by a fine of not more than fifty thousand dollars and any officer, director or agent of the corporation violating any provision thereof or authorizing such violation, or any person who violates or in any way knowingly aids or abets the violation of any provision thereof, shall be punished by a fine of not more than ten thousand dolars or by imprisonment for not more than one year, or both."

[5] Coalition for Tax Reform, Inc., and United Peoples, Inc. (both nonelected political committees).

[6] The text of that order is as follows: "This is a petition for declaratory judgment brought before the single justice of the Supreme Judicial Court. The plaintiffs seek a declaration that G.L. c. 55, § 8, as appearing in St. 1975, c. 151, § 1, is unconstitutional, both on its face and as applied to them.

"The plaintiffs assert that they intend to use corporate funds to publicize their views on a constitutional amendment which will be submitted to the voters through a referendum on the November 2d ballot and which would authorize the Legislature to impose a graduated personal income tax. They also assert that G.L. c. 55, § 8, unconstitutionally precludes them from doing so and that the Attorney General has indicated he will prosecute apparent violations of the statute. The plaintiffs further assert that there is a case or controversy under G.L. c. 231A, § 1.

The plaintiffs are two national banking associations organized under the laws of the United States with usual places of business in Boston, and three business corporations (two organized under the laws of the Commonwealth of Massachusetts and one under the laws of the State of Delaware), with either principal or usual places of business in Massachusetts. They all are actively involved in substantial business activities in Massachusetts. They all alleged that the adoption of the proposed amendment would substantially and materially affect their business activities in a variety of ways including, but not limited to, discouraging highly qualified executives and highly skilled professional personnel from settling, working or remaining in Massachusetts; promoting a tax climate which would be considered unfavorable by business corporations, thereby discouraging them from settling in Massachusetts with "resultant adverse effects" on the plaintiff banks' loans, deposits, and other services; and tending to shrink the disposable income of individuals available for the purchase

"The single justice heard the case on April 26, 1976, and reserved and reported the case without decision. On April 30, 1976, the Coalition for Tax Reform, Inc. and United Peoples, Inc. filed a motion to intervene as parties defendant. The original parties and interveners entered into a supplementary statement of agreed facts and on May 11, 1976, the single justice allowed the motion to intervene and entered a revised reservation and report indicating the changed circumstances.

"The case was heard by the court on June 8, 1976. On consideration of the facts and the law applicable, we rule that the plaintiffs have not shown that G.L. c. 55, § 8, is unconstitutional or an invalid exercise of legislative power. The single justice shall order the entry of an appropriate judgment declaring that the statute is valid and enforceable.

"A rescript and opinion will follow."

The plaintiffs filed a "Motion for Stay or Injunction and Expedited Determination" on September 30, 1976, which was denied by the full court on the same date. We note that they filed a "Notice of Appeal" to the Supreme Court of the United States on September 29, 1976. Said appeal appears to be pending before that court. We note further that the proposed amendment was defeated at the polls on November 2, 1976.

of the consumer products manufactured by at least one of the plaintiff corporations. Although the plaintiffs hold these views, the record does not establish that these views are supported in fact. Rather, the parties have agreed that "[t]here is a division of opinion among economists as to whether and to what extent a graduated income tax imposed solely on individuals would affect the business and assets of corporations." The statute requires generally that a referendum matter "materially affect" a corporation's "property, business or assets" before it may expend moneys to publicize its views on that matter. It states specifically that "[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation." The plaintiffs have not shown, on this record, that the type of taxation authorized by the proposed amendment in fact would have such an effect.[7]

1. *Legislative and Judicial History.*

We note that this is not the first time that this type of prohibition has been before us. In *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647 (1962), we held that a referendum question proposing a constitutional amendment granting the Legislature the power to impose a graduated income tax on either corporations or individuals (or both) reasonably might be thought by the directors of the defendant corporation to be a matter materially affecting the corporation's property, business or assets.[8] We, therefore, held that the

[7] The "Statement of Agreed Facts" stipulates that forty-one States and the District of Columbia impose income taxes and that thirty-six States and the District of Columbia have graduated income taxes.

[8] The text of the proposed constitutional amendment in issue in 1962 is set forth in the *Lustwerk* case at 648 n.1. The statute in issue is that case prohibited generally corporate contributions and expenditures in regard to elections (G.L. c. 55, § 7, as amended through St. 1946, c. 537, § 10). It is quoted in material part at 648

statute as then constituted did not prohibit expenditures by such corporations for the purpose of influencing the voters on that proposed constitutional amendment. In *First Nat'l Bank* v. *Attorney Gen.*, 362 Mass. 570 (1972) (*First Nat'l Bank I*), we considered the effect of a legislative amendment of the statute (after *Lustwerk*) which added the following sentence to G.L. c. 55, § 7: "No question submitted to the voters concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation." (See St. 1972, c. 458[9]).

The court was divided as to whether the issue of the validity of G.L. c. 55, § 7, could be resolved merely by statutory construction thereof or whether it was necessary to consider its constitutionality. Three Justices took the former view; two Justices took the latter view. All five agreed that the proposed constitutional amendment contained in the 1972 referendum question would authorize the Legislature to impose a graduated income tax on both individuals and corporations, or either. See *First Nat'l Bank I* at 575 (Tauro, C.J.) (Reardon, J., concurring); and at 593 (Quirico, J., with whom Braucher and Kaplan, JJ., join, concurring in the result). Chief Justice Tauro felt impelled in these circumstances to reach the constitutional

n.2 of *Lustwerk*. That statute was the precursor of G.L. c. 55, § 8, in issue here but was in significantly different form; it did not contain the sentence now included in § 8, namely: "No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation." The prohibition on corporate political activity was merely stated to preclude corporations from expending or contributing money on matters "other than one materially affecting any of the property, business or assets of the corporation." Thus, neither the parties nor this court in *Lustwerk* had any legislative statement as to what "materially" affected the corporate interests.

[9] The text of G.L. c. 55, § 7, as it stood in 1972 is quoted in *First Nat'l Bank I* at 573 n.3. The text of the referendum question in 1972 is set forth in full in *First Nat'l Bank I* at 572 n.2.

issue involved in determining the validity of the prohibitions contained in G.L. c. 55, § 7. They came to the conclusion that this statute, as framed in 1972, was invalid because (in part) it did "not meet the requirements of a narrowly drawn law, circumscribing only the evil to be curtailed." *Id.* at 590. However, these Justices were careful to point out that they did "not reach the general question of the manner, mode and extent to which corporate expression may be limited to ensure free elections" (footnote omitted). *Ibid.*

The other three Justices did not find it necessary to reach the constitutional question. Rather, they interpreted the statutory addition as inapplicable to the 1972 referendum question because that question concerned the levying of a graduated corporate income tax as well as a graduated personal income tax. See *id.* at 593 (Quirico, J., concurring). Since three Justices held G.L. c. 55, § 7, inapplicable, and two others viewed it as unconstitutional, the plaintiffs of 1972 (some of whom are now plaintiffs in this matter) prevailed, and were allowed to make contributions to a political committee to campaign against the proposed amendment. It was defeated.

Subsequent to the decision in *First Nat'l Bank I*, G.L. c. 55 was amended on various occasions. General Laws c. 55, § 7, ultimately became G.L. c. 55, § 8. The most significant post-*First Nat'l Bank I* amendment was to rephrase the second sentence of the first paragraph previously found in § 7 by adding the word "solely." This sentence now reads: "No question submitted to the voters *solely* concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation" (emphasis supplied).[10]

[10] As to the post-*First Nat'l Bank I* revisions of G.L. c. 55, § 8, see St. 1973, c. 348; St. 1973, c. 1173, § 4B; St. 1974, c. 859; St. 1975, c. 151, § 1.

Further, the referendum question for 1976 did not, like the questions considered in *Lustwerk* and *First Nat'l Bank I*, apply in any way to corporate income taxation. The statutory amendment to § 8 makes it clear that the Legislature has specifically proscribed corporate expenditures of moneys relative to this proposed amendment. We conclude therefore that the plaintiffs' claim that G.L. c. 55, § 8, is unconstitutional must be considered. Before doing that, however, we must first deal with certain procedural problems raised by the defendants.

2. *Procedural Considerations.*

In *First Nat'l Bank I, supra,* a challenge was raised to the constitutionality of the precursor to § 8 in a proceeding for declaratory relief. When an actual controversy exists we have held that such a proceeding against the Attorney General is an appropriate method of securing a determination of such a claim. *Mobil Oil Corp.* v. *Attorney Gen.*, 361 Mass. 401, 405 (1972), and cases cited. Cf. *Attorney Gen.* v. *Kenco Optics, Inc.*, Mass. , (1976).[a] The defendants do not dispute the use of this procedure in such circumstances but they argue (a) that this particular case is not ripe for adjudication, and (b) that there is not an actual controversy over one of the issues presented. We disagree.

(a) The defendants ground their lack of ripeness claim on their characterization of the record in this case as "inadequate" to present the issues raised. They suggest that we defer consideration of these issues until after a full trial on the merits. We think that the record in this case, which consists of an extensive stipulation of facts among the parties, is sufficient to support this adjudication and to present the issues raised. The record appendices total some 128 pages; there are 66 paragraphs of stipulated facts and 70 pages of supporting documents relevant

[a] Mass. Adv. Sh. (1976) 2, 6.

to those stipulations. To the extent that the record may be properly characterized as "inadequate," we believe that the inadequacy is related to the plaintiffs' failure on certain evidentiary propositions, a matter we treat below in part 3 (d) of this opinion. Thus, the only inadequacy present relates to the merits of the plaintiffs' position rather than to the procedural posture of the case.

(b) The defendants also claim that, because the Attorney General has indicated that he will not prosecute the plaintiffs for distributing "in-house" newspapers to employees or communications to stockholders that advocate their position on the GIT, there is no actual controversy (see G.L. c. 231A, § 1) presented as to that matter. However, there is an actual controversy presented as to the statute's general application, scope and construction, and resolution of that controversy will of necessity involve resolution of the problem of "in-house" publications and communications. Consequently, even if we were to determine that the Attorney General's stated position vitiates the existence of a controversy on the "in-house" issue standing alone, the case is nevertheless in a posture which requires determination of that narrow issue as part of the broader issue of the statute's general scope. Thus, the case is properly before us and we turn now to the constitutional issues presented.

3. *First Amendment Considerations.*

The plaintiffs' first constitutional claim is that G.L. c. 55, § 8, violates their rights under the First Amendment to the United States Constitution. They argue that the section is invalid on its face, and that it is overbroad and void for vagueness. Alternatively they claim that, even if facially valid, the statute is unconstitutional as applied to them. The plaintiffs argue further thay [sic] they are "artificial persons" and so cannot act or communicate except through representatives or third parties, whose actions or commu-

nications necessarily involve an expenditure by the plaintiffs. In essence, they assume a corporate right to free speech under both the Federal and State Constitutions and also assume that a prohibition of the expenditure of corporate funds impermissibly precludes the exercise of that right. It is clear that an act which limits either contributions or expenditures "operate[s] in an area of the most fundamental First Amendment activities." *Buckley* v. *Valeo,* 424 U.S. 1, 14 (1976). It is also clear that any statutory limitation on expenditures in regard to the electoral process imposes "significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions. *Buckley* v. *Valeo,* at 23. "[S]peech does not lose its First Amendment protection because money is spent to project [sic] it, as in a paid advertisement of one form or another." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 761 (1976). Nor does the fact that speech is exercised by a profit-making entity defeat *per se* its constitutionally protected aspects. *New York Times Co. v. Sullivan,* 376 U.S. 254, 266 (1964). We note in this regard that G.L. c. 55, § 8, precludes both corporate contributions and corporate expenditures on political questions as to which the corporation's property, business or assets are not materially affected.[11]

We start then with the premise that G.L. c. 55, § 8, potentially implicates the First Amendment, and that any distinction between "speech" and "conduct," cf. *United States* v. *O'Brien,* 391 U.S. 367 (1968), has no vitality here.

[11] General Laws c. 55, § 1, defines the distinction between "contribution" and "expenditure." The plaintiffs rely primarily on the prohibition on expenditures in making their argument; the defendants argue that while the plaintiffs now allege they wish to "expend," the record shows that in 1972 all of the plaintiffs except Digital Equipment Corporation made contributions to a political committee in regard to the referendum question then in issue. Since G.L. c. 55, § 8, imposes a complete bar to either contributions or expenditures, the distinction made between them in *Buckley* v. *Valeo, supra,* is not helpful here. Also, under the view we take of this case it does not appear to be a relevant one.

See *Buckley* v. *Valeo, supra.* But this premise does not reach a more basic question here involved, namely, whether business corporations, such as the plaintiffs, have First Amendment rights coextensive with those of natural persons or associations of natural persons. Therefore, before we consider the plaintiffs' various claims, we must first consider whether and to what extent corporations possess First Amendment rights.

(a) *The First Amendment rights of corporations.* It is undisputed that a corporation "is neither a citizen of a state nor of the United States within the protection of the privileges and immunities clauses of Article IV, § 2 of the Constitution and the Fourteenth Amendment." *Asbury Hosp.* v. *Cass County,* 326 U.S. 207, 210-211 (1945). Furthermore, it has been stated that "[t]he liberty referred to in [the Fourteenth] Amendment is the liberty of natural, not artificial persons." *Northwestern Nat'l Life Ins. Co.* v. *Riggs,* 203 U.S. 243, 255 (1906). See *Hague* v. *Committee for Indus. Organizations,* 307 U.S. 496, 527 (1939). But there are limits on the extent to which corporations may be totally deprived of what would be considered due process "liberty" rights if normal persons were involved.

The Supreme Court has recognized that corporations are entitled to some Fourteenth Amendment protections whether they are viewed as "citizens" or not. In *Grosjean* v. *American Press Co.,* 297 U.S. 233, 244 (1936), the Court stated: "Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause. [Citation omitted.] But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here." The Supreme Court had previously indicated in *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535 (1925), that "[a]ppellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. *North-*

western Life Ins. Co. v. *Riggs,* 203 U.S. 243, 255 [1906]; *Western Turf Association* v. *Greenberg,* 204 U.S. 359, 363 [1907]. But they have business and property for which they claim protection."

The plaintiffs concede in their brief that they are "only asserting rights which stem from the equal protection and due process of law clauses." What they appear to argue is that such rights as corporations may have under such clauses are coextensive with the First Amendment rights of natural persons. They cite no case to this proposition nor do we find this aspect of their argument persuasive.

It seems clear to us that a corporation does not have the same First Amendment rights to free speech as those of a natural person, but, whether its rights are designated "liberty" rights or "property" rights,[12] a corporation's property and business interests are entitled to Fourteenth Amendment protection. *Pierce* v. *Society of Sisters, supra.* See *Bowe* v. *Secretary of the Commonwealth,* 320 Mass. 230, 251 (1946). It is also clear that, as an incident of such protection, corporations possess certain rights of speech and expression under the First Amendment.[13]

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[12] As Chief Justice Tauro and Justice Reardon recognized in *First Nat'l Bank I,* such characterizations may not be relied on to establish that corporations have no First Amendment rights: "The Attorney General concludes . . . that . . . a corporation cannot claim protection under the term 'liberty' in the due process clause, [and that] a corporation cannot claim a right to freedom of expression, because that is a liberty protected by the First Amendment, not a property right. We cannot agree." *Id.* at 583.

[13] The constitutional discussion by the two Justices in *First Nat'l Bank I* suggests that there may be a difference between the First Amendment rights afforded corporations in the business of communications and corporations pursuing general commercial interests. *Id.* at 584-585. See *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952). None of the plaintiffs here claims to be part of the "institutional press," nor do they claim the right of "free press." Nor has anyone asserted that G.L. c. 55, § 8, bars the press, corporate, institutional or otherwise, from engaging in discussion or debate on the referendum question. Consequently we need not venture an opinion on such matters.

Thus, we hold today that only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public. This limitation is identical to the legislative command in the first sentence of G.L. c. 55, § 8. Put in another way, the Legislature has clearly identified in the challenged statute the parameters of corporate free speech.

(b) *The "unconstitutional as applied" attack.* The plaintiffs' alternative First Amendment claim is that § 8 is invalid as applied to them because adoption of a personal GIT would materially affect their business, property or assets. To support this claim the plaintiffs point to our decision in *Lustwerk* v. *Lytron, Inc.,* 344 Mass. 647 (1962), and to the opinion of Chief Justice Tauro in *First Nat'l Bank I.* The plaintiffs conclude that those opinions held the issue of a personal GIT to be "material *per se* to the business of all corporations operating within Massachusetts." We cannot agree that that is the import of those two opinions. *Lustwerk* was a director-shareholder's suit to enjoin the defendant corporation and its other directors from making an expenditure related to a general (corporate and personal) GIT referendum on the ground that such an expenditure would be *ultra vires.* We concluded, "[W]e cannot say on the basis of this somewhat meager record that a board of directors of a business corporation could not reasonably decide that its business would be materially affected by the grant of such . . . [a] taxing power." *Lustwerk* v. *Lytron, Inc., supra* at 651.

As we have previously indicated, *First Nat'l Bank I* involved a referendum on a general GIT. Even the two Justices reaching the constitutional question acknowledged the "materially affects" limitation, concluding only that "the plaintiffs' business interests [may be] reasonably

considered to be materially affected by the proposed [general GIT] constitutional amendment . . . .'' 362 Mass. at 591. As a result we think that the plaintiffs' extrapolation of the holdings in *Lustwerk* and *First Nat'l Bank I* to the current proposed amendment is unwarranted. While we do not doubt that those opinions stand for the proposition that the possible adoption of a corporate GIT or a corporate *and* personal GIT materially affects the business of all corporations in this Commonwealth, that issue is not before us at this time. Neither *Lustwerk* nor *First Nat'l Bank I* is controlling as to the validity of the second sentence of § 8 since the present referendum question provides no authorization for legislative enactment of a corporate graduated income tax.[14] The only question is whether the legislative judgment that ''[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation'' was a valid one. See G.L. c. 55, § 8. We cannot say that there was no rational basis for this legislative determination. Cf. *First Nat'l Bank I* at 592-597 (Quirico, J., concurring in result).

The statutory prohibition can only be invalid as to the plaintiffs if they have demonstrated that the proposed amendment does in fact materially affect their business. The plaintiffs have not made such a showing. Indeed, the plaintiffs admit as much in their brief, stating that ''[t]here is no express finding herein that the plaintiffs' material interests would in fact be affected by the ballot question.'' The plaintiffs attempt to overcome this failure of proof

[14] The plaintiffs point out that Chief Justice Tauro indicated in *First Nat'l Bank I* that the Legislature may already have the power to impose a graduated corporate excise tax on the basis of income. This question is also not before us.

in a number of ways which we discuss in the margin.[15] It is sufficient to note here that the plaintiffs' failure cannot be excused by any of their arguments. We conclude that, on this record, the statute is not unconstitutional as applied to the plaintiffs.

Nevertheless it is the plaintiffs' claim that the statutory proviso that ''[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of . . . [a] corporation,'' is overbroad and void for vagueness. We turn now to those concerns, treating the overbreadth issue first.

(c) *Overbreadth.* The doctrine of overbreadth, which applies to a statute that restricts First Amendment rights, allows a plaintiff to attack the statute in question as invalid on its face even if his speech or conduct ''might be of the class properly the subject of State regulation, for '[i]t matters not that the words . . . used might have been constitutionally prohibited under a narrowly and precisely drawn statute.' '' *Commonwealth* v. *A Juvenile,* Mass. , (1975),[b] quoting from *Gooding* v. *Wilson,* 405 U.S.

[15] The plaintiffs state that ''[i]n the nature of things there could not be such a finding in this case which was commenced in April [1976].'' It seems clear that, in the nature of things, the plaintiffs had control over the commencement of this litigation, and the fact that the case is before us on a stipulation of facts rather than after a full trial on the merits must be charged to the plaintiffs. As the defendants point out, the amendment of § 8 in question occurred in the spring of 1975 (see St. 1975, c. 151, § 1). The plaintiffs could then have sought declaratory relief and pursued a trial on the merits with sufficient time for adjudication before the November, 1976, election. They did not, and their failure to do so cannot excuse the absence of a finding that they are in fact materially affected by the proposed amendment.

The plaintiffs further argue that all they need show is a ''reasonable belief'' that the proposed amendment would materially affect them. While such a belief is relevant to the question whether such an expenditure would be ultra vires, cf. *Lustwerk* v. *Lytron, Inc.,* 344 Mass. 647, 651 (1962), standing alone it is not relevant to the question presented herein.

[b] Mass. Adv. Sh. (1975) 2766, 2772.

518, 520 (1972). "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973). See *Commonwealth* v. *Dennis*, Mass. (1975).[c] Thus, even if the plaintiffs' expenditure of moneys can be regulated constitutionally by the Legislature, we must still determine whether § 8 applies to speech or other activities that cannot be constitutionally regulated.

The plaintiffs argue that the statute is overbroad in that it appears to prohibit activities which are protected, such as the use of "in-house" newspapers and publications or communications to stockholders on the question of a personal GIT; the participation by corporate employees (at corporate expense) in discussions at legislative hearings as to the advisability of adopting a personal GIT; and the publishing of letters to the editor on that subject in corporate newsletters. The constitutionality of a statute alleged to proscribe activities of this nature was before the Supreme Court in *United States* v. *C.I.O.*, 335 U.S. 106 (1948). In words equally applicable to this case, the Court stated: "If [the law] were construed to prohibit the publication, by corporations . . . in the regular course of conducting their affairs, of periodicals advising their [employees or stockholders] of danger or advantage to their interests from the adoption of measures, . . . the gravest doubt would arise in our minds as to its constitutionality." *Id.* at 121. However, we also agree with the Supreme Court that "[i]t would require explicit words in an act to convince us that [the Legislature] intended to bar a trade journal, a house organ or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular

[c] Mass. Adv. Sh. (1975) 1924.

course of its publication. It is unduly stretching language to say that the [employees] or stockholders are unwilling participants in such normal organizational activities, including the advocacy thereby of governmental policies affecting their interests, and the support thereby of candidates [or proposals] thought to be favorable [or adverse] to their interests." *Id.* at 123. There are no such "explicit words" in § 8 and we do not think that the Legislature intended it to apply to such activities. Nor is there any language in § 8 which would preclude corporate officers, directors, stockholders or employees from expressing their views publicly on the merits of such a proposed referendum by participation in television or radio discussions, news conferences, statements issued to the press or through other similar means not involving contributions or expenditures of corporate funds. We add in this regard that the plaintiffs' claim that a corporation, being an artificial person, cannot communicate its views except by the expenditure of additional funds is demonstrated neither by this record nor the well known facts of American society. We credit the Legislature with knowledge of such facts and, in doing so, find that § 8 does not bar such activities which are in the normal course of the plaintiffs' corporate affairs and do not involve corporate expenditures specifically designed to influence the electoral process. This type of activity does not involve the type of corporate expenditures or injection into political campaigns or referenda which the Legislature sought to regulate in enacting § 8.

So construed, we believe that the statute avoids any potential overbreadth problems; "[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973), quoted in *Commonwealth* v. *A Juvenile*, Mass. , 1975.[d] Because these

[d] Mass. Adv. Sh. (1975) 2766, 2786.

activities mentioned by the plaintiffs are not included within the legislative proscription in § 8 against contribution or expenditure of funds or other things of value for the purpose of "influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation," and the more specific command as to a personal GIT, we conclude that the statute is not "susceptible of application to protected expression." *Gooding* v. *Wilson,* 405 U.S. 518, 523 (1972). In adopting this construction we recognize that "our task is not to destroy the [statute] if we can, but to construe it, if consistent with the will of [the Legislature], so as to comport with constitutional limitations." *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers,* 413 U.S. 548, 571 (1973).

(d) *The void for vagueness issue.* "[T]he vagueness doctrine ensures that a statute be drawn with the requisite clarity so that a person has sufficient notice of what conduct on his part may be criminal. In addition, it ensures that no statute have such a 'standardless sweep' as to allow discriminate enforcement." *Commonwealth* v. *A Juvenile,* Mass. , - n.15 (1975),* and cases cited. Although there is thus a distinction between void for vagueness scrutiny and that scrutiny applicable to a claim of overbreadth, "the 'void for vagueness' doctrine often overlaps in effect the overbreadth doctrine." *Id.* at .† See generally *Karlan* v. *Cincinnati,* 416 U.S. 924, 925 (1974) (Douglas, J., dissenting). Indeed, the plaintiffs' claims herein with respect to vagueness are almost identical to their claims with respect to overbreadth. In effect they argue that the same statutory language that they perceive to be overbroad is also unconstitutionally vague and indefinite. We disagree.

* Mass. Adv. Sh. (1975) 2766, 2788-2789 n.15.
† Mass. Adv. Sh. (1975) at 2788 n.15.

A statute is void for vagueness only if "men of common intelligence must necessarily guess at its meaning . . . ." *Connally* v. *General Constr. Co.,* 269 U.S. 385, 391 (1926). See *Broadrick* v. *Oklahoma,* 413 U.S. 601, 607 (1973), and cases cited. It must be recognized in a vagueness inquiry, however, that "[w]ords inevitably contain gems of uncertainty," *id.* at 608, and that "there are limitations in the English language with respect to being both specific and manageably brief . . . ." *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, supra* at 578-579. Thus, "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise." *United States* v. *Harriss,* 347 U.S. 612, 618 (1954).

On consideration of these constitutional guidelines, we hold that § 8 is not invalid by reason of being impermissibly vague. We recognize that the "materially affects" limitation is general in nature; but we also note that the statutory proscription in question here — the prohibition against corporate expenditures on a referendum question *solely* concerning a personal GIT — is both precise and definite. Furthermore, as to those activities which the plaintiffs claim may be within the specific proscription,[16] thereby making it unconstitutionally vague, we suggest they are so similar in nature to the types of activities claimed to make the statute overbroad that our limiting construction adopted in part 3 (c) of this opinion, *supra,* supplies any definiteness which the proscription otherwise might lack. Such a

[16] The plaintiffs wonder whether an economist employed by one of the plaintiff banks would be in violation of § 8 when his or her comments on the effect of adoption of a personal GIT are sought by a newspaper and he or she responds during working hours, and whether a lunchtime address on that subject by a corporate officer to a chamber of commerce would violate § 8. We think it clear from our overbreadth discussion that neither of these activities would violate the statute.

construction is an appropriate way to avoid invalidation on grounds of vagueness. *Winters* v. *New York*, 333 U.S. 507, 510 (1948). See *Commonwealth* v. *A Juvenile*, Mass. , - (1975).[s] We recognize that, even in light of limiting construction, "the prohibitions may not satisfy those intent on finding fault at any cost"; but we believe that "they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, *supra* at 579.[17] Consequently, we conclude that § 8, as construed in this opinion, is not unconstitutionally vague.

(e) *Articles 16 and 19 of the Massachusetts Declaration of Rights.* The plaintiffs claim that G.L. c. 55, §8, is invalid by virtue of the provisions of arts. 16 and 19 of the Declaration of Rights of the Constitution of the Commonwealth.

Article 16, as appearing in art. 77 of the Amendments, provides as follows: "The liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged."

Article 19 states: "The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good: give instructions to their representatives, and to request of the legislative body, by way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."

The plaintiffs' arguments under these provisions generally track their First and Fourteenth Amendment claims,

[s] Mass. Adv. Sh. (1975) 2766, 2788-2792.

[17] In terms of this case, "even if the outermost boundaries of [§ 8] may be imprecise, any such uncertainty has little relevance here, where . . . [the plaintiffs' intended] conduct falls squarely within the 'hard core' of the statute's proscriptions . . . ." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973). *Parker* v. *Levy*, 417 U.S. 733, 757 (1974).

except that they add here the claim that, since neither of these articles restricts itself to "persons" in describing the rights protected, corporations are necessarily included within their scope. To support these claims they rely primarily on the opinion of the court in *Bowe* v. *Secretary of the Commonwealth*, 320 Mass. 230 (1946), and the opinion of the two Justices in *First Nat'l Bank I*. Neither opinion supports the contentions of the plaintiffs.

Bowe involved labor unions, not corporations. To the extent there are dicta therein relating to corporations and their rights, it is clear that this court there assumed such a right to free speech to exist — as we do — where a referendum question "might materially affect the property, business or assets of the corporation." *Id.* at 234. Nor does the opinion of the two Justices in *First Nat'l Bank I* go any further. 362 Mass. at 585-586.

Since we have stated previously that the freedoms protected by arts. 16 and 19 are "comparable" to those guaranteed by the First Amendment, *Bowe* v. *Secretary of the Commonwealth*, *supra*, we see no need to elaborate further on our prior discussion of free speech claims by the plaintiffs.[18] General Laws. c. 55, § 8, as applied to these plaintiffs, is not invalid by virtue of these provisions of the Declaration of Rights.

4. *The Equal Protection Issue.*

The plaintiffs' next constitutional claim is that the § 8 prohibition denies them their right to equal protection of the laws under the Fourteenth Amendment and art. 1 of the Declaration of Rights. They argue that because the prohibition impinges on a fundamental constitutional right (free speech) strict scrutiny is required. Alternatively they

[18] The amendment of art. 16 in 1948 subsequent to *Bowe* adding the sentence, "The right of free speech shall not be abridged," does not have relevance to arguments here raised. *Bowe* assumed such a right to exist. See *First Nat'l Bank I* at 586.

conclude that, even if such scrutiny is not required, the statute must fall because it does not bear a reasonable relation to a permissible governmental objective. The plaintiffs find invidious discrimination in the statute's failure similarly to restrict labor unions, voluntary associations such as business trusts, real estate investment trusts, charitable corporations, and limited or general partnerships.

We think that the appropriate standard of review on this issue is not the strict scrutiny that the plaintiffs suggest is apposite but, rather, is the traditional scrutiny involving economic matters. While we agree with the plaintiffs that where free speech is involved strict scrutiny is required (see *San Antonio Independent School Dist.* v. *Rodriquez,* 411 U.S. 1, 17 [1973]; *Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92, 101 [1972]), we have already concluded that the plaintiffs do not possess First Amendment rights on matters not shown to affect materially their business, property or assets. Our inquiry, therefore, is whether the legislative classification "rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced [are] treated alike." *F.S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). See *Pinnick* v. *Cleary,* 360 Mass. 1, 27-28 (1971).

We believe that the legislative classification in § 8 rests on such a difference with respect to all the groups pointed to by the plaintiffs except business trusts and real estate investment trusts. That difference is that general business corporations, unlike labor unions or charitable corporations, have shareholders. Section 8 could represent a legislative desire to protect such shareholders against ultra vires activities, and could thus be "reasonably related to a legitimate public purpose." *Pinnick* v. *Cleary, supra* at 27-28.

With respect to the Legislature's noninclusion of business

trusts and real estate investment trusts which also have "shareholders," the Legislature may justifiably have concluded that such trusts did not present the type of problem in this area presented by general business corporations. See *Liggett Co.* v. *Lee,* 288 U.S. 517, 541 (1933) (Brandeis, J., dissenting in part). Furthermore, "[w]hen legislative authority is exerted within a proper area, it need not embrace every conceivable problem within that field. The Legislature may proceed one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Mobil Oil Corp.* v. *Attorney Gen.,* 361 Mass. 401, 417 (1972), and cases cited. "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Railway Express Agency, Inc.* v. *New York,* 336 U.S. 106, 110 (1949). See *Buckley* v. *Valeo,* 424 U.S. 1, 99 (1976).

5. *Creation of an "Irrebuttable Evidentiary Presumption."*

The plaintiffs' final argument is that the recent amendment of § 8 creates an irrebuttable evidentiary presumption which deprives them of their right to due process of law. They argue that the legislative statement that "[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of . . . [a] corporation" (§ 8) conclusively presumes "a fact which constitutes one of the elements of the crime as defined by the Legislature."

We believe that this argument is without merit for the simple reason that the statutory prohibition does not utilize the device of a presumption to aid the prosecution in proving their case beyond a reasonable doubt. As our previous discussion demonstrates, the Legislature may validly proscribe corporate expenditures on a referendum question solely relating to adoption of a personal GIT. Although § 8 as amended may be inelegantly written, it re-

quires the prosecution to prove that: (1) the defendant is a corporation; (2) the defendant corporation made an expenditure; (3) the purpose of the expenditure was to influence or affect the vote; and (4) that the vote was on a question solely relating to the taxation of the income, property, or transactions of individuals. Unless the Commonwealth can prove these elements beyond a reasonable doubt, *Commonwealth* v. *Kostka*, Mass. , (1976);[h] *In re Winship*, 397 U.S. 358, 364 (1970), it cannot secure a conviction for the specific crime of making an expenditure solely concerning a personal GIT.[19]

Unlike a statute employing a presumption or an inference which allows the trier of fact to find proof of one element of a crime after another element of the crime has been established (see generally *Commonwealth* v. *Pauley*, Mass. [1975],[i] and cases discussed therein; McCormick, Evidence § 342 [2d ed. 1972]), the specific crime set out in § 8 requires direct proof of all its elements.[20] Consequently, we find the plaintiffs' reliance on cases like *Turner* v. *United States*, 396 U.S. 398 (1970), *Leary* v. *United States*, 395 U.S. 6 (1969), and *Tot* v. *United States*, 319 U.S. 463 (1943), misplaced. Section 8 does not contain an irrebuttable presumption; nor does it deprive the plaintiffs of their right to due process of law.

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[h] Mass. Adv. Sh. (1976) 1608, 1630.

[19] This specific crime is admittedly related to the general crime of making such an expenditure on a matter which does not materially affect a corporation's property, business or assets, but we think that the specific prohibition is a separate crime. It appears that the plaintiffs' "conclusive presumption" attack is based on reading the two crimes together, a result perhaps attributable to the legislative redrafting and amending process.

[i] Mass. Adv. Sh. (1975) 2224.

[20] The plaintiffs' argument would have considerable force if the statute indicated that all corporate contributions on a referendum question involving a general GIT were presumed to be expenitures on a GIT solely affecting individuals. That, of course, is not the case here but it is that type of situation which, by employing a presumption as part of the prosecution's case-in-chief, might well violate due process standards.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SUFFOLK, ss
No. 653

THE FIRST NATIONAL BANK OF BOSTON
& others
vs.
ATTORNEY GENERAL

ORDER

This is a petition for declaratory judgment brought before the single justice of the Supreme Judicial Court. The plaintiffs seek a declaration that G.L. c. 55, § 8, as appearing in St. 1975, c. 151, § 1, is unconstitutional, both on its face and as applied to them.

The plaintiffs assert that they intend to use corporate funds to publicize their views on a constitutional amendment which will be submitted to the voters through a referemdum [sic] on the November 2d ballot and which would authorize the Legislature to impose a graduated personal income tax. They also assert that G.L. c. 55, § 8, unconstitutionally precludes them from doing so and that the Attorney General has indicated he will prosecute apparent violations of the statute. The plaintiffs further assert that there is a case or controversy under G.L. c. 231 A, § 1.

The single justice heard the case on April 26, 1976, and reserved and reported the case without decision. On April 30, 1976, the Coalition for Tax Reform, Inc. and United Peoples, Inc. filed a motion to intervene as parties defendant. The original parties and interveners entered into a

supplementary statement of agreed facts and on May 11, 1976, the single justice allowed the motion to intervene and entered a revised reservation and report indicating the changed circumstances.

The case was heard by the court on June 8, 1976. On consideration of the facts and the law applicable, we rule that the plaintiffs have not shown that G.L. c. 55, § 8, is unconstitutional or an invalid exercise of legislative power. The single justice shall order the entry of an appropriate judgment declaring that the statute is valid and enforceable.

A rescript and opinion will follow.

By the Court
/s/ FREDERICK J. QUINLAN
Clerk

September 22, 1976

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss.
No. 76-109 Civ.

FIRST NATIONAL BANK OF BOSTON, ET ALS
vs.
ATTORNEY GENERAL

JUDGMENT

This action came on to be heard before the Court, BRAUCHER, J. presiding, and the issues having been duly heard,

It is ORDERED AND ADJUDGED,

that the provisions of G.L. c. 55, § 8 as appearing in St. 1975, c. 151, § 1, are valid under the Massachusetts and United States Constitutions, both on their face and as applied to the plaintiffs, and that the Attorney General may enforce the provisions of said statute.

Dated at Boston, Massachusetts, this twenty-eight day of September, 1976.

Clerk of Court
/s/ JOHN E. POWERS
Clerk
/s/ JOHN E. POWERS

A true copy
ATTEST:
September 29, 1976

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SUFFOLK, SS
No. 653

No. 76-109 Civ.

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION and
WYMAN-GORDON COMPANY,
PLAINTIFFS

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL
DEFENDANT

NOTICE OF APPEAL

Please take notice that The First National Bank of Boston, New England Merchants National Bank, The Gillette Company, Digital Equipment Corporation, and Wyman-Gordon Company hereby appeal, pursuant to 28 U.S.C. § 1257(2), to the Supreme Court of the United States from the Order of the Supreme Judicial Court for the Commonwealth of Massachusetts in this matter entered September 28, 1976, denying plaintiffs' request for a declaration that Massachusetts General Laws chapter 55, § 8 is unconstitutional.

DATED: September 29, 1976

By their attorneys
FRANCIS H. FOX
E. Susan Garsh
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Mass. 02110
617-357-9300

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 1976, I served a copy of the foregoing Notice of Appeal by personally delivering a copy thereof to Thomas R. Kiley, Assistant Attorney General, 1 Ashburton Place, Boston, Massachusetts, attorney for defendant, and Ernest Winsor, Esquire, Massachusetts Law Reform Institute, 2 Park Square, Boston, Massachusetts 02116, attorneys for Intervenors.

E. Susan Garsh

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

SUFFOLK, ss

At Boston,
SJC #653
September 30, 1976
(Suffolk Cty. #76-109 Civ.)

THE FIRST NATIONAL BANK OF BOSTON, et al.,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL

ORDER

Upon consideration by the full court, the plaintiffs' motion for stay or injunction is denied.

By the Court,
/s/ FREDERICK J. QUINLAN
Clerk

September 30, 1976.
A true copy,
ATTEST:

/s/ FREDERICK J. QUINLAN
Clerk, Supreme Judicial Court
for the Commonwealth

APPENDIX F

STATEMENT OF AGREED FACTS

Note: Plaintiff The First National Bank of Boston will be referred to herein as "First National"; plaintiff New England Merchants National Bank will be referred to herein as "Merchants"; plaintiff Wyman-Gordon Company will be referred to herein as "Wyman-Gordon"; plaintiff The Gillette Company will be referred to herein as "Gillette"; and plaintiff Digital Equipment Corporation will be referred to herein as "Digital".

1. Plaintiff First National is a national banking association, organized and existing under the laws of the United States with a usual place of business in Boston, Suffolk County, Massachusetts.

2. Plaintiff Merchants is a national banking association, organized and existing under the laws of the United States with a usual place of business in Boston, Suffolk County, Massachusetts.

3. Plaintiff Wyman-Gordon is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts with a usual place of business in Worcester, Worcester County, Massachusetts.

4. Plaintiff Gillette is a corporation duly organized and existing under the laws of the State of Delaware with a principal place of business in Boston, Suffolk County, Massachusetts.

5. Plaintiff Digital is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts with a principal place of business in Maynard, Middlesex County, Massachusetts.

6. Defendant Francis X. Bellotti is the Attorney General of the Commonwealth.

7. Plaintiff Banks are engaged in the County of Suffolk in the business of retail, commercial and other forms of banking activities. These include, but are not limited to, maintaining savings and checking accounts for the benefit of both individual and corporate depositors, making loans to individuals and to corporations, acting as trustee for the

benefit of beneficiaries designated by their customers, acting as transfer agent for certain publicly held corporations and performing other services normally associated with the banking business.

8. Wyman-Gordon is a business corporation engaged in the business or die forging, utilizing highly sophisticated metal forming techniques. Wyman-Gordon principally serves the aircraft and turbine engine industries. It has plants in Worcester, Grafton and Millbury, Massachusetts, and employs approximately 1,700 persons in Massachusetts.

9. Gillette is a business corporation engaged in the development, manufacture and sale of blades, razors, toiletries, grooming aids, writing instruments and other consumer products and service. It has plants in South Boston and Andover, Massachusetts, and employs approximately 6,000 persons in Massachusetts.

10. Digital is a business corporation engaged in the design, manufacture, sales and servicing of computers, computer systems, peripherals and associated computer accessories and other items and systems using digital techniques. It operates in a highly competitive market from which such major and well-established companies as RCA, General Electric, Singer and Xerox have elected to withdraw within the past five years. Digital has plants in Acton, Leominster, Marlborough, Maynard, Natick, Northboro, Springfield, Waltham, Westfield, Westminster, West Springfield, and Worcester, Massachusetts, and employs approximately 11,500 persons in Massachusetts.

11. There will be submitted to the voters of Massachusetts in the general election of November 2, 1976, a legislative amendment to the Constitution of the Commonwealth proposing to grant to the General Court the power and authority to impose a graduated income tax on personal incomes. The proposed legislative amendment neither imposes nor requires the imposition of a graduated income tax on

individuals and does not purport to authorize the imposition of graduated taxes upon corporate income. A copy of the proposed amendment is appended hereto and marked "A". A copy of the Summary which will appear on the ballot is appended hereto and marked "B".

12. There is a division of opinion among economists as to whether and to what extent a graduated income tax imposed solely on individuals would affect the business and assets of corporations.

13. It is the position of the management of plaintiffs that a graduated income tax (and thus the proposed Constitutional Amendment) would adversely affect their business and property. None of the plaintiffs have communicated with their shareholders on this matter except as is stated in Paragraph 63.

14. It is the position of the management of plaintiff Banks that one way in which the graduated income tax would adversely affect their business and property is by discouraging persons of high ranking executive and middle management ability from settling, remaining, or working in Massachusetts, thus depriving the Banks of a source of high level executive and middle management talent.

15. As of April 13, 1976, there were 550 employees of First National earning $20,000 or more annually. Of these there are 207 employees earning $20,000 to $24,999, 96 employees earning $25,000 to $29,999, 137 employees earning $30,000 to $59,999 and 10 employees earning $60,000 to $191,000.

16. As of April 12, 1976, there were 175 employees of Merchants earning $20,000 or more annually. Of these there are 134 employees earning $20,000 to $30,000, 33 employees earning $30,000 to $40,000 and eight employees earning $40,000 to $140,000.

17. It is the position of the management of plaintiff Banks that the graduated income tax would adversely af-

fect their business and property by tending to reduce the total balance of individual checking and savings account deposits. As of April 13, 1976, First National had approximately:

126,000 individual checking accounts with an approximate balance of	$146,000,000
and	
137,000 individual savings accounts with an approximate balance of	$206,000,000

As of April 12, 1976, Merchants had approximately:

74,000 personal demand deposits with an approximate balance of	$ 53,500,000
and	
83,000 individual savings accounts with an approximate balance of	$137,700,000

18. It is the position of the management of plaintiff Banks that the graduated income tax would adversely affect their business and property by producing an adverse effect on the total of individual loans made by the Banks.

19. First National had approximately 209,000 individual loans outstanding, with an approximate balance of $227,139,000, as of April 13, 1976.

20. Merchants had approximately 77,000 personal loans outstanding, with an approximate balance of $73,000,000, as of April 12, 1976.

21. It is the position of the management of plaintiff Banks that the graduated income tax would adversely affect their business and property by tending to discourage business from settling or remaining in Massachusetts, with resultant adverse effects on the Banks' industrial loans, deposits, and other services.

22. First National had approximately 6,000 industrial and corporate loans outstanding, with an approximate balance of $1,872,000,000, as of April 13, 1976.

23. Merchants had commercial loans outstanding with an approximate balance of $569,300,000 as of April 12, 1976.

24. First National had approximately 29,000 industrial and commercial deposit accounts, with an approximate balance of $897,000,000 as of April 13, 1976.

25. Merchants had approximately 14,000 commercial deposit accounts with an approximate balance of $358,889,000 as of April 12, 1976.

26. Plaintiff Banks maintain their headquarters in Suffolk County, Massachusetts. They have no branch offices in any other state, or in any Massachusetts county other than Suffolk.

27. In 1972, First National expended or contributed $3,000 to oppose a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax.

28. In 1972, Merchants expended or contributed $3,000 to oppose a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax.

29. It is the position of the management of Wyman-Gordon that the graduated income tax (and thus the proposed Constitutional Amendment) would adversely affect its business and property in the following ways, among others:

a. it would tend to discourage persons of high rank-in executive ability from settling or remaining in Massachusetts, thus depriving Wyman-Gordon of a source of high level executive talent, and

b. it would tend to discourage highly skilled and trained, and thus highly paid, engineering and technical specialists from settling in or remaining in Massachusetts, thus depriving Wyman-Gordon of

a source of talent necessary for it to conduct its business.

30. Wyman-Gordon's total number of employees at its Massachusetts plants varies through the years, but remains approximately in the 1,700 - 2,000 range. The total payroll for these employees annualized from April 13, 1976, is approximately $27,000,000.

31. As of April 13, 1976, there were presently 206 employees of Wyman-Gordon earning $20,000 or more. Of these there were 133 junior executives and technicians earning $20,000 to $25,000, 36 executive and technical personnel earning $25,000 to $30,000, and 37 executives earning $30,000 or more. The highest salary paid is $130,000.

32. In 1972, Wyman-Gordon expended or contributed $3,000 to oppose a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax.

33. It is the position of the management of Gillette that the graduated income tax (and thus the proposed Constitutional Amendment) would adversely affect its business and property by tending to discourage persons of high ranking executive and middle management ability from settling or remaining in Massachusetts, thus depriving Gillette of a source of high level executive and middle management talent, and by tending to shrink disposable income of individuals available for the purchase of consumer products.

34. Gillette's total number of Massachusetts employees is approximately 6,000 and the total annual payroll for these employees was approximately $73,800,000 in calendar year 1974, out of a total United States payroll of $108,200,000.

35. As of April 16, 1976, there were 857 employees at Gillette earning $20,000 or more. Of these there are 574 employees earning $20,000 to $30,000, 226 employees earning $30,000 to $50,000, and 57 employees earning more than $50,00.

36. Gillette's net sales in Massachusetts during the calendar year 1974 were $39,600,000, as against total net sales of $517,700,000 in the United States for the same period.

37. Gillette owned tangible property in Massachusetts worth $30,000,000 in 1974 and leasehold improvements in Massachusetts worth $1,500,000 in calendar year 1974.

38. In 1972 Gillette expended or contributed $3,000 to oppose a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax.

39. It is the position of the management of Digital that the graduated income tax (and thus the proposed Constitutional Amendment) would adversely affect its business and property in the following ways, among others:

a. it would impair Digital's ability to attract executive, technical and other skilled professional people to Massachusetts, and

b. the number of Massachusetts-based employees wishing to relocate to Digital facilities in New Hampshire, Arizona and elsewhere would increase.

40. Digital's total number of Massachusetts employees as of April 15, 1976, was 11,500. The total annual payroll for these employees for calendar year 1975 was approximately $131,000,000.

41. As of April 15, 1976, there were 1,207 employees at Digital earning $20,000 or more. Of these there were 1,054 employees earning between $20,000 and $30,000, 142 employees earning between $30,000 and $50,000, and 11 employees earning over $50,000.

42. Digital's net sales of products and services to customers in Massachusetts for calendar 1975 was $27,300,000.

43. In 1972, Digital expended or contributed no monies

to oppose a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax.

44. Plaintiffs intended to expend monies to publicize by paid advertisements in newspapers and other media their contentions with respect to the graduated income tax and the proposed Constitutional Amendment in an attempt to persuade the voters of Massachusetts to defeat the proposed Constitutional Amendment at the general election.

45. First National desires to, and but for G.L. c. 55 § 8 would, place messages in its own in-house monthly newspaper called *About the First*. The purpose of such messages would be to attempt to persuade its own employees to vote against the proposed Constitutional Amendment. This publication is printed by First National solely for its own employees and is mailed to approximately 5,300 employees at their home addresses. Space in the said newspaper is a thing of some value, and it costs money to publish this paper. However, First National has not and will not place such messages in the paper out of respect for the law and for fear of criminal prosecution for violation of the statute. The Attorney General has not indicated that he will prosecute First National for placing such messages in its own in-house newspaper.

46. First National employs four professional economists who frequently comment publicly on economic conditions in Massachusetts, and would, but for G.L. c. 55 § 8, comment publicly on the effect a graduated income tax would have on the Massachusetts economy. The Attorney General has not indicated that he will prosecute First National or the professional economists if the professional economists make such public comments.

47. Wyman-Gordon desires to, and but for G.L. c. 55 § 8 would, express its views on the proposed Constitutional Amendment in its internal newsletter "Information for

Management" distributed to 275 monthly-paid employees. It costs money to print this newsletter, and Wyman-Gordon has not and will not express its views on this matter in said newsletter out of respect for the law and for fear of criminal prosecution for violation of the statute. The Attorney General has not indicated that he will prosecute Wyman-Gordon for placing such messages in its own in-house newsletter.

48. Gillette desires to, and but for G.L. c. 55, § 8 would, express its views on the proposed Constitutional Amendment to its employees through its "Gillette Company Newsletter" and other internal bulletins. It costs money to print and deliver these publications, and Gillette will not express its view on this matter in said publications out of respect for the law and for fear of criminal prosecution for violation of the statute. The Attorney General has not indicated that he will prosecute Gillette for placing such messages in its own internal publications.

49. Digital desires to, and but for G.L. c. 55 § 8 would, express its views on the proposed Constitutional Amendment to its employees through "Digital This Week", an internal newsletter distributed weekly to employees, and through "On Line", a quarterly magazine mailed to employees at their home addresses. It costs money to print and distribute these publications, and Digital will not express its views on this matter in said publication out of respect for the law and for fear of criminal prosecution for violation of the statute. The Attorney General has not indicated that he will prosecute Digital for placing such messages in its own internal publications.

50. There is appended hereto a two-page document marked "C". The said document lists certain Real Estate Investment Trusts which are organized under the laws of Massachusetts, and sets forth certain financial and other information concerning these trusts.

51. The total assets of the Real Estate Investment Trusts shown on Exhibit "C" are approximately $5,458,901,000.

52. The total "Gross Income" for the said trusts is approximately $402,829,000. This is an annual gross income figure which reflects the latest reported accounting of the varied fiscal years of each of the REITS on the list.

53. There are many other business trusts organized under the laws of Massachusetts, although no income or asset statistics on said business trusts are readily available to the parties. The Massachusetts Secretary of State's records show 7,500 Massachusetts business trusts have filed reports in accordance with G.L. c. 182 §2 as of April 1, 1976.

54. During 1972, the most recent year for which income statistics are available, the Statistical Abstract of the United States shows that there are 15,000 Massachusetts partnerships which earned a total of $1,816,000,000 in business receipts.

55. The Department of Labor and Industries, *Directories of Labor Organizations in Massachusetts* (1975) lists 2,250 individual local labor organizations in the state with a membership of 590,625.

56. In a joint session of the two branches held July 2, 1969, the General Court approved a proposed amendment to the Massachusetts Constitution which purported to authorize the imposition of a graduated income tax. The proposed amendment received two hundred four (204) votes in the affirmative and forty-nine (49) in the negative.

57. In a joint session of the two branches held May 12, 1971, the General Court approved a proposed amendment to the Massachusetts Constitution which purported to authorize the imposition of a graduated income tax. The proposed amendment received two hundred forty-five (245) votes in the affirmative and twenty (20) in the negative.

58. On November 7, 1972, the proposed amendment to the Massachusetts Constitution which purported to authorize the imposition of a graduated income tax was submitted to the voters of the Commonwealth at the Biennial State Election. A total of two million five hundred three thousand four hundred ninety-four (2,503,494) ballots were cast at that election. Three hundred thirty-five thousand eight hundred twenty-five (335,825) blank ballots were recorded on the graduated income tax amendment. The proposed amendment was rejected by the voters. It received one million four hundred fifty-five thousand six hundred thirty-nine (1,455,639) votes in the negative and seven hundred twelve thousand and thirty (712,030) votes in the affirmative.

59. On June 6, 1972, the Committee for Jobs and Government Economy was organized as a non-elected political committee with a purpose of supporting or opposing tax proposals which would influence the state's economy. The Committee for Jobs and Government Economy raised and expended approximately one hundred twenty thousand dollars ($120,000) in opposition to the proposed graduated income tax amendment as indicated in copies of the financial reports filed by the Committee which are appended hereto and marked "D". The Committee for Jobs and Government Economy was the only duly organized non-elected political committee to raise and expend money to oppose the proposed amendment.

60. On September 22, 1972, the Coalition for Tax Reform, Inc., was organized as a non-elected political committee with the stated purpose of promoting passage of the proposed graduated income tax amendment. The Coalition for Tax Reform, Inc., raised and expended approximately seven thousand dollars ($7,000) to promote the proposed amendment, as indicated in copies of the financial reports filed by the Coalition which are appended hereto and marked "E". The Coalition for Tax Reform, Inc., was the only duly organized political committee to raise

and expend money to promote the proposed amendment.

61. Forty-one (41) states and the District of Columbia impose income taxes on personal income. Thirty-six (36) states and the District of Columbia have graduated income taxes.

62. The boards of directors of all of the plaintiff corporations were notified of the commencement of this action. The boards of directors of three of the plaintiffs formally ratified the commencement of the action.

63. At the annual meeting of stockholders of First National Boston Corporation, which is the parent of the plaintiff First National, held on March 18, 1976, in response to a question on the proposed graduated state income tax, the management of First National responded, in part, that as presently proposed, its economists feel that a graduated tax would affect the entire middle-management group and that it was already hard enough to keep businesses from moving out of the state. The question and response were reprinted in the Questions & Answers section of the Summary Report of the Annual Meeting, which was mailed to all shareholders.

The parties have agreed that the facts recited in the Statement of Agreed Facts are true. Plaintiffs and the defendant do not necessarily agree with each other as to the relevance of each fact. Plaintiffs and the defendant each reserve the right to argue as to the relevance, or lack of relevance, of any particular fact set forth herein.

FRANCIS H. FOX
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BINGHAM, DANA & GOULD
Attorneys for the Plaintiffs

FRANCIS X. BELLOTTI
Attorney General
By THOMAS R. KILEY
THOMAS R. KILEY
Assistant Attorney General

"A"

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Seventy-five

PROPOSAL FOR A LEGISLATIVE AMENDMENT TO THE CONSTITUTION AUTHORIZING THE GENERAL COURT TO IMPOSE AND LEVY A GRADUATED TAX ON PERSONAL INCOME AND TO BASE SUCH TAX UPON THE FEDERAL INCOME TAX.

A majority of all the members elected to the Senate and House of Representatives, in joint session, hereby declares it to be expedient to alter the Constitution by the adoption of the following Article of Amendment, to the end that it may become a part of the Constitution [if similarly agreed to in a joint session of the next General Court and approved by the people at the state election next following]:

ARTICLE OF AMENDMENT

ART. . As an alternative to levying a tax on incomes in the manner provided in Article XLIV of the Amendments to the Constitution, the General Court shall have full power and authority to levy a tax on personal incomes at rates which are graduated according to the total amount of income received, regardless of the sources from which it may be derived, and to grant reasonable exemptions, deductions, credits and abatements to such tax. Further, the General Court may define the tax liability or the total income upon which such tax is levied or the graduated rates at which it is taxed by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time and may prescribe reasonable exceptions to and modifications of such provision.

IN JOINT SESSION, August 15, 1973.

The foregoing legislative amendment of the Constitution is agreed to in joint session of the two houses of the General Court, said amendment having received the affirmative votes of a majority of all the members elected; and it is referred to the next General Court in accordance with a provision of the Constitution.

(s) (Illegible)
Clerk of the Joint Session.

IN JOINT SESSION, May 7, 1975.

The foregoing legislative amendment is agreed to in joint session of the two houses of the General Court, said amendment having received the affirmative votes of a majority of all the members elected; and this fact is hereby certified to the Secretary of the Commonwealth, in accordance with a provision of the Constitution.

(s) EDWARD B. O'NEILL
Clerk of the Joint Session.

SECRETARY OF STATE
May 29 11:12 AM '75
ELECTION DIVISION

"B"

QUESTION 2

The proposed amendment would authorize, but not require, the Legislature to modify the personal income tax laws of Massachusetts by the use of graduated rates instead of the present flat or uniform rates. The graduated rates would be based on the total amount of income received, without distinguishing between earned and unearned income. The Legislature would also be authorized to provide for reasonable exemptions, deductions and abatements and could base any such graduated income tax provision on provisions of Federal income tax law.

"C"

20 LARGEST REAL ESTATE INVESTMENT TRUSTS IN MASS.*

	Name	*Fiscal Year*	*Total Assets*	*Gross Income*
1.	Chase Manhattan Mortgage Mortgage & Realty Trust, Boston	1975	$940,643,000.	$38,079,000.**
2.	Continental Mortgage Investors, Boston	1975	$729,050,000.	$58,225,000.
3.	Connecticut General Mortgage and Realty Inc., Springfield	1975	$442,000,000.	$41,361,000.
4.	Diversified Mortgage Investors, Boston	1975	$373,984,000.	$28,816,000.
5.	Equitable Life Mortgage & Realty Investors, Boston	1975	$358,961,000.	$32,555,000.
6.	C.I. Mortgage Group, Boston	1975	$324,735,000.	$20,602,000.
7.	Massmutual Mortgage & Realty Inv., Springfield	1975	$231,038,000.	$18,604,000.
8.	North American Mortgage Mortgage Investors, Boston	1975	$212,478,000.	$20,939,000.
9.	Cabot, Cabot & Forbes Land Trust, Boston	1975	$206,169,000	$13,846,000.
10.	Security Mortgage Investors, Boston	1975	$205,029,000.	$11,621,000.
11.	First Pennsylvania Mortgage Trust, Boston	1975	$188,758,000.	$ 9,702,000.
12.	Institutional Investors Trust, Boston	1975	$186,468,000.	$11,951,000.
13.	C. I. Realty Investors	1975	$185,768,000.	$30,514,000.
14.	BT Mortgage Investors,	1975	$170,316,000.	$ 9,889,000.
15.	Gulf Mortgage & Realty Inv., Boston	1975	$150,540,000.	$11,023,000.
16.	State Mutual Inv., Worcester	1975	$137,914,000.	$ 9,696,000.
17.	Barnes Mortgage Investment Trust, Boston	1975	$118,153,000.	$ 7,464,000.
18.	American Fletcher Mortgage Inv., Boston	1974	$114,473,000.	$ 7,617,000.
19.	Hubbard Real Estate Investment, Boston	1975	$ 94,993,000.	$ 8,784,000.
20.	TMC Mortgage Investors, Boston	1974	$ 87,431,000.	$11,541,000.

* American Banker, Vol. CXL No. 191, Oct. 2, 1975
** Figures supplied by National Association of Real Estate Investment Trusts, 1101 Seventeenth St., N.W. Washington, D.C. 20036

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SUFFOLK, ss.

Civil Action No. 76-109

THE FIRST NATIONAL BANK OF BOSTON, et al.

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL

SUPPLEMENTARY STATEMENT OF AGREED FACTS

1. Coalition for Tax Reform, Inc. (CTR) is a non-profit corporation organized and existing under the laws of Massachusetts. CTR is a so-called "umbrella" organization of individuals and other membership organizations, set up for the primary purpose of working for passage of the graduated income tax amendment to the state constitution. Its member organizations include the League of Women Voters, the Massachusetts Teachers Association, Americans for Democratic Action, Massachusetts Fair Share, Inc., Common Cause, National Association of Social Workers, Massachusetts Council of Churches, United Peoples, Inc., and others. CTR was the principal advocate of the GIT in the 1972 referendum campaign and expects it will be the principal advocate in the 1976 campaign.

2. United Peoples, Inc. (UP) is a non-profit membership corporation organized and existing under the laws of Massachusetts. Its members consist of persons living in the Framingham area. It was organized for the purpose of promoting the rights of welfare recipients and working on other low-income issues. Its board of directors has adopted a policy in favor of passage of a graduated income tax (GIT).

3. It is the position of the leadership of CTR and UP that voter approval of a graduated income tax amendment would not materially affect the property, business or assets of business corporations, because said leadership believes that:

(a) All economic surveys known to the leadership of CTR and UP conducted in the last 30 years to determine the factors which influence business location decisions have concluded that taxation is only sixth or seventh in importance, after such other, more influential, factors as availability and cost of labor, raw materials, power, transportation and the availability of markets.

(b) The factor of taxation referred to in the aforementioned surveys has meant business, as opposed to personal, taxation, or the combination of both.

(c) Economists have generally assumed that personal taxation, as a separate factor, has such an insignificant effect on business location decisions that it has not been a factor worth studying.

(d) Economists have, however, surveyed the factors which affect executives' personal location decisions, and have generally concluded that other factors are more important than personal taxation, such as the quality of schools, the availability of transportation in and out of the business center, cultural features and other "quality-of-life" factors.

(e) There is no economic study known to CTR or UP which suggests that the introduction of a graduated income tax would deter potential executives from moving into, or cause them to move out of, this state.

(f) While the personal acquisitiveness of many high paid businessmen has in the past motivated, and will in the future motivate, them to fight the introduction of a graduated income tax, if such a tax were in

fact introduced in this state such businessmen would grumble but, generally, pay the tax and remain.

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Attorney General
By: THOMAS R. KILEY
Assistant Attorney General

/s/ ERNEST WINSOR
ERNEST WINSOR
MASSACHUSETTS LAW REFORM INSTITUTE
Attorney for Coalition for Tax Reform, Inc. and United Peoples, Inc.

Dated: May 11, 1976

APPENDIX G

HOUSE ..... No. 547

By Mr. Businger of Brookline, petition of John A. Businger that provision be made for a graduated personal income tax. Taxation.

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred & Seventy-Seven

AN ACT PROVIDING FOR A GRADUATED PERSONAL INCOME TAX.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 62 of the General Laws is hereby amended by striking out sections 2 to 6, inclusive, as most recently amended by sections 38 to 41, inclusive, of chapter 684 of the acts of 1975, and inserting in place thereof the following sections:—

Section 2. (a) Massachusetts gross income shall mean the federal gross income, modified as required by section seven, with the following further modifications:—

(1) The items to be added thereto are:—

(A) Interest on governmental obligations excluded under section one hundred and three of the Code, other than interest from any such obligation issued by the commonwealth, any political subdivision thereof, or any agency or instrumentality of either of the foregoing, which is exempt from taxation under clause Twenty-fifth of section five or chapter fifty-nine or any other provision of law.

(B) The dividends excluded under section one hundred and sixteen of the Code.

(C) Earned income from foreign sources excluded under section nine hundred and eleven of the Code.

(D) Contributions for annuity contracts excluded under section four hundred and three (b) of the Code to the extent that such contributions were made pursuant to a salary reduction agreement authorized under said section and were not required under a retirement program of the employer.

(E) Amounts excluded under Subchapter S of the Code.

(F) Amounts included in or considered to be Massachusetts gross income under any other provision of this chapter.

(2) The items to be deducted therefrom are:—

(A) Interest on obligations of the United States exempt from state income taxation to the extent included in federal gross income.

(B) Amount included in federal gross income under Subchapter S of the Code.

(C) Dividends received from a corporate trust subject to taxation under this chapter to the extent that such dividends are exempt from taxation under section eight of this chapter.

(D) Income from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed.

(E) Income from annuity stock bonus, pension, profit-sharing, annuity or deferred-payment plans or contracts described in sections four hundred and three (b) or four hundred and four of the Code until an aggregate amount of such income has been deducted under this subparagraph equal to the aggregate of all amounts previously subjected to taxation under this chapter.

(*b*) Massachusetts adjusted gross income shall be the Massachusetts gross income less the following deductions:

(1) The first one thousand dollars of net capital loss; provided, however, that any excess over one thousand dollars of such net capital loss shall be applied to reduce the

net capital gain of the taxpayer, plus one thousand dollars of income in each of the five succeeding years to the extent that such amount exceeds the total of any net capital gain and one thousand dollars of income of any taxable year intervening between the taxable year in which the net capital loss arose and such succeeding taxable year.

(2) The deductions allowable under sections sixty-two and four hundred and four, without regard to section two hundred and sixty-five of the Code, provided, however, the following deductions shall not be allowed:—

(A) The deduction for long-term capital gains allowed by section one thousand two hundred and two of the Code.

(B) The deductions allowed to life tenants and income beneficiaries by paragraph six of section sixty-two of the Code insofar as such deductions are allowed to a trust or estate subject to taxation under this chapter.

(C) The deduction for moving expenses allowed by section two hundred and seventeen of the Code.

(D) Any deduction allowed by Subchapter S of the Code.

(E) Any deduction relating or allocable to any income not included in Massachusetts gross income or a proportionate part of any deduction which is in part so relating or allocable.

(F) Any net operating loss deduction allowed by section one hundred and seventy-two of the Code.

(G) In the case of an individual who is an employee within the meaning of section four hundred and one *(c)* (1) of the Code, the deductions allowed by section four hundred and four and four hundred and five *(c)* of the Code to the extent attributable to contributions made on behalf of such individual; however, no contribution on behalf of such individual shall be treated as an excess contribution under this chapter unless treated as an excess contribution for federal tax purposes in the year made.

(H) The deduction allowed by section one thousand three hundred and seventy-nine *(b)* (3) of the Code.

(c) Massachusetts taxable income shall be the Massachusetts adjusted gross income less the deductions and exemptions allowable under section three.

Section 3. In determining the Massachusetts taxable income, the following deductions and exemptions shall be allowed:—

(a) Deductions:

(1) The net amount of the Massachusetts adjusted gross income of trustees or other fiduciaries subject to taxation under section nine or ten as is payable to or accumulated for persons not inhabitants of the commonwealth to the extent that such income would not be subject to taxation under section five A if received by a non-resident.

(2) Such net amount of the Massachusetts adjusted gross income of trustees, executors or administrators as is, pursuant to the terms of the will, deed or other instruments governing the estate or trust, currently payable to or irrevocably set aside for public charitable purposes, or to or for the benefit of any organization or organizations established and operated exclusively for charitable purposes.

(3) Taxes paid to the United States under the provisions of the Federal Insurance Contributions Act or the Federal Railroad Retirement Act.

(4) All sums deducted from wages as contributions to an annuity, pension, endowment or retirement fund of the United States government, the commonwealth or any political subdivision thereof, and any income from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed, or any income from a contributory annuity, pension, endowment or retirement fund of any other state or any political subdivision thereof, provided that income

from any such similar fund established under the laws of the commonwealth is not subject to taxation in such other state or political subdivision.

(5) All amounts deductibel [sic] as alimony under section two hundred and fifteen of the Code.

(6) Interests and dividends in the amount of one hundred dollars for a single person or a married person filing a separate return or two hundred dollars for a husband and wife filing a joint return from savings deposits, savings accounts, shares or share savings accounts in any savings or co-operative bank, trust company or credit union incorporated in or chartered by the commonwealth; in any national banking association, federal savings or loan association or federal credit union located in the commonwealth; in any banking company or Morris Plan company subject to chapter one hundred and seventy-two A; in any savings or loan association under the supervision of the commissioner of banks.

(7) In the case of an individual who maintains a household which includes as a member one or more qualifying individuals, the employment related expenses paid during the taxable year to enable the taxpayer to be gainfully employed to be computed according to and subject to the limitations and restrictions of section two hundred and fourteen (c), section two hundred and fourteen (d) and section two hundred and fourteen (e) (5) of the Internal Revenue Code; provided, that in the case of a taxpayer who is gainfully employed on less than a substantially full-time basis only that portion of the amount paid which is attributable to employment related expenses necessary for such gainful employment shall be taken into account in computing the deduction allowed herein. If the taxpayer is married for any period during the taxable year, there shall be taken into account employment related expenses incurred during any month of such period only if both spouses, except where one

spouse is a qualifying individual described in section two hundred and fourteen (b) (1) (c) of the Internal Revenue Code, are gainfully employed. No deduction shall be allowed under this subparagraph for any amount paid by the taxpayer (i) to his or her spouse or (ii) to an individual bearing a relationship to the taxpayer described in paragraphs (1) through (8) of section one hundred and fifty-two (a) of the Internal Revenue Code who, for the taxable year of the taxpayer is a member of the taxpayer's household or is claimed as a dependent of the taxpayer for the purposes of section one hundred and fifty-one (e) of the Internal Revenue Code. If the taxpayer is married at the close of the taxable year, the deduction provided herein shall be allowed only if the taxpayer and his spouse file a joint return for the taxable year. For the purposes of this subparagraph, the terms "employment related expenses", "qualifying individual" and "maintaining a household" shall each have the same meaning as in section two hundred and fourteen of the Internal Revenue Code. The expenses on which the deduction is based shall have been paid during the tax year that is being reported. No expenses incurred prior to January first, nineteen hundred and seventy-five shall be claimed under this section regardless of when paid.

(8) In the case of an individual who maintains a household which includes as a member one or more individuals under the age of twelve who qualify for exemption as a dependent under section one hundred and fifty-one of the Code, six hundred dollars; provided, that no deduction shall be allowed under this subparagraph if a deduction is claimed under subparagraph (7) of this paragraph. If the taxpayer is married at the close of the taxable year, the deduction provided herein shall be allowed only if the taxpayer and his spouse file a joint return for the taxable year. For the purposes of this subparagraph, the term

"maintaining a household" shall have the same meaning as in section two hundred and fourteen of the Code.

(9) An amount equal to the deduction for medical, dental and other expenses allowed under section two hundred and thirteen of the Code. No deduction shall be allowable under this paragraph to an individual who elects the standard deduction under section one hundred and forty-one of the Code on his federal income tax return or to one who files a joint federal income tax return with his spouse unless a joint return is also filed under this chapter.

(10) An amount equal to the fees, in excess of three per cent of the Massachusetts adjusted gross income paid within the taxable year to any agency licensed to place children for adoption by the taxpayer on account of the adoption of a minor child.

(b) Exemptions:

(1) In the case of a single person,

(A) a personal exemption of two thousand dollars,

(B) An additional exemption of two thousand dollars if the taxpayer was totally blind at the close of his taxable year, and

(C) an additional exemption of six hundred dollars if the taxpayer had attained the age of sixty-five before the close of his taxable year.

(2) In the case of a husband and wife filing a joint return,

(A) a personal exemption of two thousand dollars and an amount not exceeding two thousand dollars, equal to the earned income included in the gross income of the spouse having the smaller amount of such income; and an additional exemption of six hundred dollars for the spouse having the smaller amount of income, provided that the total of such income of such spouse for the calendar year in which the taxable year of the taxpayer began did not exceed two thousand dollars. "Earned income", as used herein, shall mean salary, wages, other employee compensation, self-

employment income and any amount received as a pension or annuity to the extent includable in earned income as defined under section nine hundred and eleven (b) of the Code.

(B) an additional exemption of two thousand dollars for each spouse who was totally blind at the close of his taxable year, and

(C) an additional exemption of six hundred dollars for each spouse who had attained the age of sixty-five before the close of his taxable year.

(3) In the case of a married person filing a separate return,

(A) a personal exemption of one thousand dollars,

(B) an additional exemption of two thousand dollars if the taxpayer was totally blind at the close of his taxable year, and

(C) an additional exemption of six hundred dollars if the taxpayer had attained the age of sixty-five before the close of his taxanle [sic] year.

(4) An exemption of six hundred dollars for each individual who qualifies for exemption as a dependent under section one hundred and fifty-one (e) of the Code.

(c) Except as hereinafter provided for a non-resident, if the taxable year of any person subject to tax under this chapter is a short taxable year, and such short taxable year is not due to the death of such person, any exemption under paragraph (b) of this section shall be limited to any amount equal to the exemption otherwise allowable by this section multiplied by a fraction the numerator of which is the number of days in tha [sic] taxable year and the denominator of which is three hundred and sixty-five. If a taxpayer is a non-resident for all or any part of a taxable year, he shall be allowed exemptions under this section equal to the amount otherwise determined under this section multiplied by a fraction the numerator of which is his Massachusetts

gross income and the denominator of which is the amount which would have been his Massachusetts gross income had he been a resident of the commonwealth throughout the taxable year.

Section 4. The taxable income of residents, non-residents to the extent specified in section five A, and corporate trusts to the extent specified in section eight shall be taxed in accordance with the following table:—

IF TAXABLE INCOME IS OVER	BUT NOT OVER	TAX IS	OF AMOUNT OVER
$0	$ 2,000	$0 + 3.75%	0
2,000	4,000	75 + 4.25%	2,000
4,000	6,000	160 + 4.75%	4,000
6,000	8,000	255 + 5.25%	6,000
8,000	12,000	360 + 5.75%	8,000
12,000	16,000	590 + 6.50%	12,000
16,000	22,000	850 + 7.75%	16,000
22,000	30,000	1315 + 9.25%	22,000
30,000	50,000	2055 + 10.50%	30,000
50,000	.....	4155 + 11.00%	50,000

Section 5. (*a*)Notwithstanding the provisions of section four, no tax shall be imposed in the instance in which the total income for the taxable year does not exceed three thousand dollars for a single individual or five thousand dollars in the aggregate for a husband and wife, nor shall any tax be imposed under this chapter which shall reduce such total income below three thousand dollars and five thousand dollars respectively. No exemption shall be allowed under this section to any married individual unless a joint return is filed. In the case of a short taxable year, occurring for any reason other than residence during one portion of the normal taxable year and non-residence during another portion, there shall be substituted for the

amounts of three thousand dollars and five thousand dollars those amounts which bear the same relation to such sums as the number of days in the taxable year bears to three hundred and sixty-five. For purposes of this section, "total income" means the sum of (i) the Massachusetts adjusted gross income, (ii) the amount deducted under subparagraph (A) of section two (a) (2), and (iii) interest on governmental obligations excluded under section one hundred and three of the Code to the extent not includable in Massachusetts gross income under section two (a) (1) (A). With respect to a person who is a non-resident for all or part of the taxable year, total income shall be determined as if he were a resident of the commonwealth throughout the entire taxable year.

(b) Notwithstanding any other provision of this chapter, no tax shall be imposed under this chapter upon any stock bonus, pension or profit-sharing trust qualifying under section four hundred and one of the Code.

Section 5A. (*a*) The Massachusetts gross income of non-residents of the commonwealth shall be determined solely with respect to items of gross income from sources within the commonwealth of such person and in determining the adjusted gross income of such non-resident only those deductions shall be allowed which are attributable to items included in Massachusetts gross income as so determined. Items of gross income from sources within the commonwealth are items of gross income derived from or effectively connected with any trade or business, including employment carried on by the taxpayer in the commonwealth or derived from the ownership of any interest in real or tangible personal property located in the commonwealth. In computing taxable income, the non-resident shall be allowed the deductions and exemptions provided in section three.

(b) The commission shall adopt regulations providing for the method of determining the items and amounts of

Massachusetts gross income derived from sources within the commonwealth by a non-resident, based upon the method set forth in section thirty-eight of chapter sixty-three or upon any other reasonable method.

(c) In applying this section, the compensation paid by the United States to its uniformed military personnel assigned to duty at military posts, bases or stations within the commonwealth for services rendered by said personnel while on active duty, shall be deemed to be from sources other than sources within the commonwealth.

Section 6. The following credits shall be allowed against the tax imposed by this chapter:

(a) A credit shall be allowed against taxes imposed by this chapter to a resident for taxes due any other state, territory or possession of the United States, or the Dominion of Canada or any of its provinces on account of any item of Massachusetts gross income subject to the following restrictions and limitations: (i) the amount of such taxes due on such income shall exclude interests and penalties; (ii) the amount of such taxes due shall be reduced by any federal credit therefor allowable on the resident's federal income tax return; and (iii) the amount of the credit allowable shall be the lesser of such taxes as reduced by (i) and (ii), or the amount of tax imposed by this chapter multiplied by a fraction the numerator of which is such item of Massachusetts gross income and the denominator of which is the total Massachusetts gross income, as the case may be.

(b) (1) Every qualified taxpayer, as defined in paragraph three of this subsection, shall be entitled to a credit of four dollars for himself, four dollars for his spouse, if any, and eight dollars for each qualified dependent, as hereinafter defined, provided, however, that no such credit shall be allowable if the total income of such individual and his spouse, as defined in paragraph *(a)* of section five, exceeds five thousand dollars for such year. No such

credit shall be allowable to a married individual unless a joint return is filed. If the tax due as shown by the return of any individual is less than the total amount of the credits which he is entitled to claim pursuant to this paragraph, such individual shall be entitled to a refund in the amount of the excess of the credits over the tax otherwise due.

(2) Any individual entitled to claim any credit pursuant to paragraph one of this subsection and not otherwise required to file a return under this chapter may obtain a refund in the amount of such credit by filing a return and claiming a refund. Any refund to which an individual is entitled under the provisions of this paragraph shall be made in the same manner as other refunds under this chapter. No refund or credit shall be allowed pursuant to this paragraph unless such credit or refund is claimed on a return filed on or before the fifteenth day of the fourth month following the close of the taxable year or within any extension of time granted for filing such return.

(3) As used in this subsection, the term "qualified taxpayer" means an individual who was an inhabitant of the commonwealth for not less than six months during the preceding calendar year, and who was not a person whom another taxpayer was entitled to claim as a dependent under section three, and the term "qualified dependent" means an individual other than a spouse whom a qualified taxpayer was entitled to claim as a dependent under said section three.

(c) In the instance in which Massachusetts gross income of an individual includes an item of income from a trustee or other fiduciary, which income is to be taxed to the trustee or fiduciary pursuant to section ten, a credit shall be allowed against the tax imposed equal to the amount of tax to be paid on such item of income by the fiduciary or trustee.

SECTION 2. Said chapter 62 is hereby further amended by striking out section 8, as appearing in section 2 of

chapter 723 of the acts of 1973, and inserting in place thereof the following section:—

Section 8. (a) A corporate trust engaged within the commonwealth in any business, activity or transaction, whether or not it maintains an office, or place of business within the commonwealth, shall be subject to the taxes imposed by this chapter.

The Massachusetts adjusted gross income of such corporate trust shall be determined as if it were a resident natural person, provided, however, that for purposes of any determination involving sections three hundred and fifty-one through three hundred and sixty-eight of the Code any corporate trust shall be treated as a corporation. No deductions or exemptions allowable under section three of this chapter shall be allowed to a corporate trust. The taxable income shall be the Massachusetts adjusted gross income apportioned to Massachusetts in accordance with section thirty-eight of chapter sixty-three.

(b) The provisions of paragraph (a) shall not apply to any corporate trust which (i) is a regulated investment company under section eight hundred and fifty-one of the Code or a real estate investment trust under section eight hundred and fifty-six of the Code; (ii) is a holding company as hereinafter defined; or (iii) its apportionment percentage for apportioning its Massachusetts adjusted gross income under paragraph (a) of this section is less than ten per cent. As used in this paragraph, the term "holding company" means any corporate trust in which ninety per cent of the book value of its assets, at the end of the taxable year, are securities and at least seventy-five per cent of such securities are issued by affiliates and at least ninety per cent of its Massachusetts gross income consists of interest, dividends and gains from the sale or exchange of capital assets; the word "affiliate" means a member of an affiliated group as defined under section one thousand five hun-

dred and four of the Code; and the word "securities" means transferable shares of beneficial interest in any corporation or other entity, bonds or debentures of any issuer or notes and other evidences of indebtedness of affiliates.

(c) Dividends on shares of any corporate trust subject to taxation under this chapter shall be exempt from taxation except as hereinafter provided. Any earnings and profits accumulated prior to taxable years commencing after December thirty-first, nineteen hundred and seventy, and during a period, if any, that such corporate trust was not subject to taxation under this chapter solely by reason of the fact that it had elected not to file with the commissioner an agreement to pay a tax shall be considered tax-free earnings and profits and the amount thereof shall be determined as of the first day of the first taxable year commencing after December thirty-first, nineteen hundred and seventy. Any earnings and profits accumulated for taxable years commencing after December thirty-first, nineteen hundred and seventy, to the extent that such earnings and profits were not subject to tax under this chapter, shall also be considered tax-free earnings and profits. Notwithstanding any other provision of this chapter, dividends paid by any corporate trust at any time while it has tax-free earnings and profits, as so determined, shall be deemed to have been made from such tax-free earnings and profits to the extent thereof; and any such dividends deemed to have been made from tax-free earnings and profits shall be includable in Massachusetts gross income, and the deduction provided for in section two (a) (2) (D) shall not apply to such dividends. Except for dividends paid from tax-free earnings and profits, all such dividends shall be exempt from taxation.

SECTION 3. Said chapter 62 is hereby further amended by striking out section 10, as most recently amended by section 3 of chapter 723 of the acts of 1973, and inserting in place thereof the following section:—

Section 10. The income received by trustees or other fiduciaries shall be taxed in the following manner:

(a) The income received by trustees or other fiduciaries described in subsection *(c)* of this section shall be subject to the taxes imposed by this chapter to the extent that the persons to whom the same is payable, or for whose benefit it is accumulated, are inhabitants of the commonwealth; provided, however, if the income received by such trustees or other fiduciaries would be subject to taxation under section five A if received by a nonresident, such income shall be taxable regardless of whether the persons to whom the income from the trust is payable or for whose benefit it is accumulated are residents or nonresidents of the commonwealth. Income received by trustees or other fiduciaries described in subsection *(c)* of this section which is accumulated for unborn or unascertained persons, or persons with uncertain interests shall be taxed as if accumulated for the benefit of a known inhabitant of the commonwealth.

For the purposes of this section and of section nine income shall be deemed to be accumulated for unborn or unascertained persons or persons with uncertain interests when thus accumulated by estates, by trustees or other fiduciaries, who are subject to the provisions of this section or of section nine, for the benefit of any future interest other than a remainder presently vested in a person or persons in being not subject to be divested by the happenings of any contingency expressly mentioned in the instrument creating the trust.

(b) In addition to the deductions allowable under other sections of this chapter, trustees or other fiduciaries may deduct (1) from the income taxable under section four a proper amount for the amortization, according to any approved method, of premiums paid upon bonds owned by them, the income of which is taxable under said section and

(2) from income taxable under section four before the income of the beneficiaries shall finally be determined:

(A) such proportion of the following items paid within the year as the amounts of income taxable under said subsection bear to the total income received by the fiduciary from all sources, (i) amounts paid for rental of safe deposit boxes; and (ii) amounts paid for premiums on surety bonds of the fiduciary; and (B) the compensation actually paid during the year to the fiduciary upon such income taxable under section four as is payable to or accumulated for inhabitants of the commonwealth, or for unborn or unascertained persons with uncertain interests, to an amount not exceeding seven pre cent [sic] of such income subject to taxation.

(c) the provisions of subsections *(a)* and *(b)* of this section shall apply to guardians and conservators appointed by a Massachusetts court; trustees under the will of a person who died an inhabitant of the commonwealth; and trustees under a trust created by a person or persons, any one of whom was an inhabitant of the commonwealth at the time of the creation of the trust or at any time during the year for which the income is computed, or who died an inhabitant of the commonwealth, any one of which trustees or other fiduciaries is an inhabitant of the commonwealth; provided, however, that said provisions shall not apply to trustees of pooled income funds, as defined in section six hundred and forty-two (c) (5) of the Code, or to trustees of charitable remainder annuity trusts or charitable remainder unitrusts, as defined in section six hundred and sixty-four (d) of the Code.

(d) Income received by estates held in trust by trustees or other fiduciaries, other than the trustees and fiduciaries described in subsection (c) of this section, which income would be subject to taxation under section five A if received by a nonresident, shall be taxed at the same rate and

in the same manner as is provided in section five A, and subject to the same exemptions and deductions.

SECTION 4. Said chapter 62 is hereby further amended by striking out section 12A, as most recently amended by section 5 of chapter 723 of the acts of 1973, and inserting in place thereof the following section:—

Section 12A. For any beneficiary whose exemptions provided under clauses one, two, three, and four of paragraph (b) of section three exceed said benficiary's income subject to taxation for the preceding calendar year, a fiduciary may, upon application by such beneficiary, claim an exemption in the amount of such excess. In the event an inhabitant of the commonwealth is a beneficiary of more than one fiduciary, the aggregate of the exemptions allowable against said inhabitant's shares of income from all fiduciaries shall not exceed the amount by which said inhabitant's exemptions allowable under clauses one, two, three, and four of paragraph (b) of section three exceed the amount of said inhabitant's income subject to taxation for the preceding calendar year.

SECTION 5. Subsection *(c)* of section 17 of said chapter 62 is hereby amended by striking out paragraph (1), as amended by section 6 of said chapter 723, and inserting in place thereof the following paragraph:—

(1) the offset against interest and dividends and the carryover on account of net capital loss provided in clause one of subsection *(b)* of section two; (2) the exemptions provided in section five and clauses one, two, three, and four of paragraph (b) of section three; (3) the credit for taxes provided in subsection *(a)* of section six to the extent that such taxes are assessed to the partners in their individual capacities, but such credit shall be allowed to the partners in their individual returns, (4) the credits provided in subsection *(b)* of section six, and (5) the credit provided in subsection *(c)* of section six.

SECTION 6. Said section 17 is hereby further amended by striking out subsection (e), as inserted by section 1 of chapter 912 of the acts of 1973, and inserting in place thereof the following subsection:—

(e) A common trust fund which qualifies as such under section five hundred and eighty-four of the Code shall be treated as a partnership for the purposes of taxation under this chapter. Such partnership shall compute all items of income, loss, deduction or credit without reference to any item of income, loss, deduction or credit of any participating account except that the provisions of section ten shall be applicable to such partnership. No loss of such partnership may be allocated to any participating account but such loss may be used by the partnership as provided in paragraph (1) of subsection *(b)*of section two. No participating account deriving income from other sources than such partnership may use any item of income, loss, deduction or credit from such other sources to reduce any income derived from such partnership except as provided in sections twelve and twelve A.

SECTION 7. Section eighty-eight of chapter six hundred and eighty four of the acts of nineteen hundred and seventy-five is hereby repealed.

SECTION 8. The provisions of this act shall take effect on January first nineteen hundred and seventy-eight and apply to taxable years commencing after December thirty-first nineteen hundred and seventy-six, provided that the voters, in the Biennial state election of nineteen hundred and seventy-six shall have approved an amendment to the state constitution repealing Article Forty-four, and empowering the General Court to enact a graduated income tax.

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION,

and

WYMAN-GORDON COMPANY,
APPELLANTS,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
APPELLEE.

APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

JURISDICTIONAL STATEMENT DOCKETED FEBRUARY 24, 1977
JURISDICTION POSTPONED APRIL 18, 1977

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

DOCKET ENTRIES

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1.	Apr. 9	Complaint for declaratory judgment filed.
2.	Apr. 9	Order of notice issued returnable on Wednesday, April 14th at 9:30 A.M. Full Court Room.
3.	Apr. 12	Order of notice returned with service endorsed thereon.
4.	Apr. 14	Appearance of Thomas R. Kiley, Asst. Attorney General, 1 Ashburton Place, Boston, Mass., for the defendant, filed.
5.	Apr. 14	Order for completion of pleadings, as on file.
6.	Apr. 21	Answer of the Attorney General filed.
7.	Apr. 21	Suggested schedule filed.
8.	Apr. 26	Statement of Agreed Facts filed.
9.	Apr. 26	Reservation and report, as on file. (Wilkins, J.)
10.	Apr. 28	Notice of assembly of record on appeal sent to Francis H. Fox, Esq., attorney for the plaintiff and to Thomas R. Kiley, Asst. Attorney General, attorney for the defendant, by a letter dated and mailed this day.
11.	Apr. 30	Motion to Intervene of Coalition for Tax Reform Inc., and United Peoples, Inc., filed. (Allowed 5/11/76)
12.	Apr. 30	Answer of intervening defendants Coalition For Tax Reform, Inc., and United Peoples, Inc. filed.
13.	May 6	Plaintiffs' Briefs and Record Appendix filed by Francis H. Fox (Bingham, Dana & Gould).

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14. May 11 Supplementary Statement of Agreed Facts filed.
15. May 11 Revised reservation and report filed.
16. June 1 Brief of Intervening Defendants (Coalition for Tax Reform, Inc. and United Peoples, Inc.) by Ernest Winsor of the Mass. Law Reform Institute.
17. June 4 Service of Plaintiffs' Reply Brief by E. Susan Garsh (Bingham, Dana & Gould)
18. June 8 Argued.
19. Sept. 22 Order (Full Court—The Single Justice shall order the entry of an appropriate judgment declaring that the statute is valid and enforceable) as on file.
20. Sept. 28 Motion for entry of judgment filed. (Allowed, Braucher, J.)
21. Sept. 28 Judgment, as on file.
22. Sept. 29 Notice of Appeal by E. Susan Garsh (Bingham, Dana & Gould)
23. Sept. 30 Motion for Stay or Injunction and Expedited Determination by Bingham, Dana & Gould (Francis H. Fox and E. Susan Garsh)
24. Sept. 30 ORDER. Upon consideration by the full court, the plaintiffs' motion for stay or injunction is denied.
25. Oct. 6 U.S. Supreme Court Order denying Application for a Stay.

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26. Feb. 1 See order entered on September 22, 1976. Rescript February 1, 1977.
Rescript. Reasons as on file. Notice sent to Counsel.
27. Mar. 1 "See order entered on September 22, 1976" as per rescript on file.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

SUFFOLK COUNTY

No. 76-109 CIV

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION,
and
WYMAN-GORDON COMPANY,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs in the above-entitled suit respectfully represent that:

1. Plaintiff, The First National Bank of Boston, is a national banking association, organized and existing under the laws of the United States with a usual place of business in Boston, Suffolk County, Massachusetts.

2. Plaintiff, New England Merchants National Bank, is a national banking association organized and existing under the laws of the United States with a usual place of business in Boston, Suffolk County, Massachusetts.

3. Plaintiff, Wyman-Gordon Company (hereinafter "Wyman-Gordon"), is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts with a usual place of business in Worcester, Worcester County, Massachusetts.

4. Plaintiff, The Gillette Company (hereinafter "Gillette"), is a corporation duly organized and existing under the laws of the State of Delaware with a principal place of business in Boston, Suffolk County, Massachusetts.

5. Plaintiff, Digital Equipment Corporation (hereinafter "Digital"), is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts with a principal place of business in Maynard, Middlesex County, Massachusetts.

6. Defendant, Francis X. Bellotti, is the Attorney General of the Commonwealth of Massachusetts.

7. Plaintiffs, The First National Bank of Boston and New England Merchants National Bank, will be referred to hereinafter as "plaintiff Banks."

8. Plaintiff Banks are engaged in Suffolk County in the business of retail, commercial and other forms of banking activities. These include, but are not limited to, maintaining savings and checking accounts for the benefit of both individual and corporate depositors, making loans to individuals and to corporations, acting as trustee for the benefit of beneficiaries designated by their customers, acting as transfer agents for certain publicly held corporations and performing other services normally associated with the banking business.

9. Wyman-Gordon is a business corporation engaged in the business of die forging, utilizing highly sophisticated metal forming techniques. Wyman-Gordon principally serves the aircraft and automotive industries. It has plants in Worcester, Grafton and Millbury, Massachusetts, and employs approximately 1800 persons in Massachusetts.

10. Gillette is a business corporation engaged in the development, manufacture and sale of blades and razors, toiletries and grooming aids, writing instruments and other consumer products and services. It has plants in South Boston and Andover, Massachusetts, and, directly and through subsidiaries, employs approximately 6,000 persons in Massachusetts.

11. Digital is a business corporation engaged in the design, manufacture, sales and servicing of computers, computer systems, peripherals and associated computer accesssories and other items and systems using digital techniques. It operates in a highly competitive market from which such major and well-established companies as RCA, General Electric, Singer and Xerox have elected to withdraw within the past five years. Digital has plants or facilities in Acton, Leominster, Marlborough, Maynard, Natick, Northboro, Springfield, Waltham, Westfield, Westminster, West Springfield, and Worcester, Massachusetts, and employs approximately 11,500 persons in Massachusetts.

12. There will be submitted to the voters of Massachusetts in the general election of November 2, 1976, a referendum proposing to amend the Constitution of the Commonwealth to grant to the General Court the power and authority to impose a graduated income tax on personal incomes. A copy of the proposed amendment is appended hereto and marked "A".

13. Plaintiff Banks believe that the graduated personal income tax (and thus the proposed Constitutional Amendment) would adversely affect their business and property in the following ways, among others:

a. it would tend to discourage persons of high ranking executive and middle management ability from settling, remaining or working in Massachusetts, thus depriving the plaintiff Banks of a source of high level executive and middle management talent;

b. it would promote a tax climate which would be considered unfavorable by business corporations, thus tending to discourage businesses from settling or remaining in Massachusetts, with resultant adverse effects on the Banks' industrial loans, deposits, and other services;

c. it would tend to shrink the total individual deposits and the total balance of loans made to individuals; and

d. in various other ways which may be brought out at trial.

14. Plaintiffs Wyman-Gordon and Digital believe that the graduated personal income tax (and thus the proposed

Constitutional Amendment) would adversely affect their business and property in the following ways, among others:

a. it would tend to discourage persons of high ranking executive and middle management ability from settling, remaining or working in Massachusetts, thus depriving plaintiffs of a source of high level executive and middle management talent;

b. it would tend to discourage highly skilled and trained, and thus highly paid, engineering and technical specialists from settling, remaining or working in Massachusetts, thus depriving plaintiffs of a source of talent necessary for them to conduct their business; and

c. in various other ways which may be brought out at trial.

15. Plaintiff Gillette believes that the graduated personal income tax (and thus the proposed Constitutional Amendment) would adversely affect its business and property in the following ways, among others:

a. it would tend to discourage persons of high ranking executive and middle management ability from settling, remaining or working in Massachusetts, thus depriving plaintiff of a source of high level executive and middle management talent;

b. it would tend to discourage highly skilled and trained, and thus highly paid, engineering and technical specialists from settling, remaining or working in Massachusetts, thus depriving plaintiff of a source of talent necessary for it to conduct its business;

c. it would tend to shrink the disposable income of individuals available for the purchase of consumer products; and

d. in various other ways which may be brought out at trial.

16. Plaintiffs intend to expend moneys to publicize by newspaper advertisements and other similar methods their

contentions with respect to the graduated personal income tax and the proposed Constitutional Amendment in an attempt to persuade the voters of Massachusetts to defeat the proposed Constitutional Amendment at the general election. Plaintiffs, being corporate entities, cannot communicate their contentions without expending some monies.

17. General Laws c. 55, §7, prior to an amendment which became effective on June 20, 1972, provided that no business or banking corporations, such as plaintiffs herein, shall directly or indirectly expend any monies for the purpose of influencing or affecting the vote on any question submitted to the voters, other than with respect to a question materially affecting any of the property, business or assets of the corporation. A copy of the said statute as it existed prior to the 1972 amendment is appended hereto and marked "B".

18. In a prior action, *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, this Court held that a proposed amendment to the Massachusetts Constitution allowing the legislature to impose a proportioned or graduated tax on incomes was a "question submitted to the voters . . . materially affecting any of the property, business or assets of the corporation" within the meaning of General Laws c. 55, §7.

19. By Chapter 458 of the Acts of 1972, effective June 20, 1972, the General Court amended General Laws c. 55, §7, by inserting, after the first sentence of said section, the following sentence:

> No question submitted to the voters concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

20. In a prior action, *The First National Bank of Boston* v. *Attorney General*, 362 Mass. 570, two members of this Court held c. 55, §7, as amended, to be unconstitutional and three members of this Court held that the statute did not

prohibit plaintiffs from making expenditures for the purpose of affecting the vote on a referendum question concerning the adoption of a constitutional amendment allowing the legislature to impose a graduated income tax on individuals and corporations.

21. By Chapter 151 of the Acts of 1975, effective April 28, 1975, the General Court has amended General Laws by striking out c. 55 and inserting in its place a new c. 55. Chapter 55, §8, is identical to the predecessor c. 55, §7, as amended, except for the insertion in the second sentence of the word "solely" so that it reads as follows:

> No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

22. Plaintiffs allege that General Laws c. 55, §8, is invalid and unconstitutional both on its face and as applied to plaintiffs, who intend to expend monies to influence the voters, as more particularly set forth in Paragraph 16 herein. The statute violates the First and Fourteenth Amendments to the Constitution of the United States, and various provisions of the Constitution of the Commonwealth, including Articles I, VII, XVI and XIX of the Declaration of Rights, and Article LXXVII of the Articles of Amendment. The said statute is not a reasonable and proper exercise of the police power under Part II, Ch. I, §1, Art. IV of the Constitution of the Commonwealth; it abridges plaintiffs' rights and privileges of freedom of speech and freedom of the press, and their rights of assembly and petition; it denies plaintiffs equal protection of the laws; it imposes arbitrary, unreasonable, discriminatory, vague and indefinite standards and restrictions upon plaintiffs' activities; and it deprives plaintiffs of their liberty and property without due process of law; all as guaranteed by both the Federal and State Constitutions.

23. Plaintiffs have communicated to defendant their beliefs that said statute is invalid and unconstitutional. Defendant, however, contends that the said statute is valid and binding and defendant intends to enforce the same. Should plaintiffs expend monies, as set forth in Paragraph 16 herein, defendant intends to prosecute them and enforce the statute as written. Plaintiffs would therefore act at their peril in carrying out their intentions to expend monies as aforesaid.

24. An actual controversy exists between each of plaintiffs and defendant.

WHEREFORE, plaintiffs respectfully pray:

1. That the Court order a speedy completion of pleadings;

2. That the Court assign the case for an immediate trial;

3. That the Court declare, pursuant to General Laws c. 231A, that General Laws c. 55, §8, is unconstitutional and invalid on its face;

4. That the Court declare, pursuant to General Laws c. 231A, that General Laws c. 55, §8, is unconstitutional as applied to plaintiffs herein;

5. For such other and further relief as the Court may deem meet and proper in the circumstances.

By their attorneys,
/s/FRANCIS H. FOX
FRANCIS H. FOX

/s/JUSTIN P. MORREALE
JUSTIN P. MORREALE

/s/E. SUSAN GARSH
E. SUSAN GARSH
BINGHAM, DANA & GOULD
100 Federal Street
Boston, MA 02110
Tel. No. (617) 357-9300

Filed April 12, 1976

"A"

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Seventy-five

PROPOSAL FOR A LEGISLATIVE AMENDMENT TO THE CONSTITUTION AUTHORIZING THE GENERAL COURT TO IMPOSE AND LEVY A GRADUATED TAX ON PERSONAL INCOME AND TO BASE SUCH TAX UPON THE FEDERAL INCOME TAX.

A majority of all the members elected to the Senate and House of Representatives, in joint session, hereby declares it to be expedient to alter the Constitution by the adoption of the following Article of Amendment, to the end that it may become a part of the Constitution [if similarly agreed to in a joint session of the next General Court and approved by the people at the state election next following]:

ARTICLE OF AMENDMENT

ART. . As an alternative to levying a tax on incomes in the manner provided in Article XLIV of the Amendments to the Constitution, the General Court shall have full power and authority to levy a tax on personal incomes at rates which are graduated according to the total amount of income received, regardless of the sources from which it may be derived, and to grant reasonable exemptions, deductions, credits and abatements to such tax. Further, the General Court may define the tax liability or the total income upon which such tax is levied or the graduated rates at which it is taxed by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time and may prescribe reasonable exceptions to and modifications of such provision.

IN JOINT SESSION, August 15, 1973.

The foregoing legislative amendment of the Constitution is agreed to in joint session of the two houses of the General Court, said amendment having received the affirmative votes of a majority of all the members elected; and it is referred to the next General Court in accordance with a provision of the Constitution.

(s) (Illegible)
Clerk of the Joint Session.

IN JOINT SESSION May 7, 1975

The foregoing legislative amendment is agreed to in joint session of the two houses of the General Court, said amendment having received the affirmative votes of a majority of all the members elected; and this fact is hereby certified to the Secretary of the Commonwealth, in accordance with a provision of the Constitution.

(s) EDWARD B. O'NEILL
Clerk of the Joint Session.

SECRETARY OF STATE
May 29 11:12 AM '75
ELECTION DIVISION

QUESTION 2

The proposed amendment would authorize, but not require, the Legislature to modify the personal income tax laws of Massachusetts by the use of graduated rates instead of the present flat or uniform rates. The graduated rates would be based on the total amount of income received, without distinguishing between earned and unearned income. The Legislature would also be authorized to provide for reasonable exemptions, deductions and abatements and could base any such graduated income tax provision on provisions of Federal income tax law.

"B"

C. 55, §7 ANNOTATED LAWS OF MASSACHUSETTS

§7. Political Contributions by Corporations, and Soliciting or Receiving Such Contributions, Penalized.

No corporation carrying on the business of a bank,

trust, surety, indemnity, safe deposit, insurance railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any country, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, no business corporation incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No person or persons, no political committee, and no person acting under the authority of a political committee, or in its behalf, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay, expend or contribute for any such purpose.

Any corporation violating any provision of this section shall be punished by a fine of not more than ten thousand dollars, and any officer, director or agent of a corporation violating any provision thereof or authorizing such violation, or any person who violates or in any way knowingly aids or abets the violation of any provision thereof, shall be punished by a fine of not more than five thousand dollars or by imprisonement for not more than six months. (1907, 576, §22; 1907, 581, §§3, 4; 1908, 483, §§1, 2; 1911, 422; 1912, 229, §§1, 2; 1913, 835, §§353, 356, 496, 499, 503; 1938, 75; 1943, 273, §1; 1946, 537, §10.)

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

(Title omitted in printing)

ANSWER

The Attorney General answers the correspondingly numbered paragraphs of the Bill of Complaint as follows:

1-11. The Attorney General admits the allegations contained in paragraphs one through eleven of the Bill of Complaint.

12. The Attorney General denies the allegations in paragraph twelve of the Bill of Complaint. Further answering the Attorney General states that on November 2, 1976 a proposed legislative amendment to the Constitution of the Commonwealth which would grant to the General Court the power to impose a graduated income tax solely on personal incomes will be submitted to the voters of Massachusetts. The defendant admits that the text of the proposed amendment is appended to the Bill of Complaint but further states that only a summary of the amendment will appear on the ballot. A copy of the summary in its current form is appended hereto and marked "A".

13-15. The Attorney General denies the allegations contained in paragraphs thirteen through fifteen of the Bill of Complaint.

16. The Attorney General admits the allegations of the first sentence of paragraph sixteen of the Bill of Complaint but denies the allegations of the remaining sentence of that paragraph.

17-21. The Attorney General admits the allegations contained in paragraphs seventeen through twenty-one of the Bill of Complaint.

22. The Attorney General states that paragraph twenty-two of the Bill of Complaint contains only allegations or

conclusions of law which need not be answered. The Attorney General denies any statement in paragraph twenty-two containing an allegation of material fact.

23. The Attorney General denies the allegations in the first sentence of paragraph twenty-three but admits the allegations of material fact contained in the remaining sentences. Further answering the Attorney General states that he has communicated with counsel of record for the Plaintiffs and been informed of the "beliefs" of the plaintiff corporations and/or the beliefs of their corporate officers.

24. The Attorney General denies the allegations contained in paragraph twenty-four of the Bill of Complaint.

By way of further answer to the Bill of Complaint the Attorney General affirmatively alleges as follows:

25. A declaration that the second sentence of General Laws, c. 55, §8 as amended is unconstitutional on its face or as applied would not fully and finally terminate any actual controversy between the parties.

26. General Laws, c. 55, §8 as most recently amended by St. 1975 c. 151 is neither unconstitutional on its face nor as applied to any of the Plaintiffs herein.

WHEREFORE, the Attorney General respectfully prays:

1. That the Court decline to render a declaratory judgment pursuant to G.L. c. 231A.

2. That the Court, acting pursuant to G.L. c. 231A, declare that G.L. c. 55, §8 as amended by St. 1975, c. 151 is a valid and binding enactment.

3. For such other and further relief as the Court may deem meet and just.

By his attorney,
FRANCIS X. BELLOTTI
by
THOMAS R. KILEY
Assistant Attorney General
McCormack Office Building
Boston, Massachusetts 02108

Dated April 20, 1976

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

(Title omitted in printing)

STATEMENT OF AGREED FACTS

Note: Plaintiff The First National Bank of Boston will be referred to herein as "First National"; plaintiff New England Merchants National Bank will be referred to herein as "Merchants"; plaintiff Wyman-Gordon Company will be referred to herein as "Wyman-Gordon"; plaintiff The Gillette Company will be referred to herein as "Gillette"; and plaintiff Digital Equipment Corporation will be referred to herein as "Digital".

1. Plaintiff First National is a national banking association, organized and existing under the laws of the United States with a usual place of business in Boston, Suffolk County, Massachusetts.

2. Plaintiff Merchants is a natonal banking association, organized and existing under the laws of the United States with a usual place of business in Boston, Suffolk County, Massachusetts.

3. Plaintiff Wyman-Gordon is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts with a usual place of business in Worcester, Worcester County, Massachusetts.

4. Plaintiff Gillette is a corporation duly organized and existing under the laws of the State of Delaware with a principal place of business in Boston, Suffolk County, Massachusetts.

5. Plaintiff Digital is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts with a principal place of business in Maynard, Middlesex County, Massachusetts.

6. Defendant Francis X. Bellotti is the Attorney General of the Commonwealth.

7. Plaintiff Banks are engaged in the County of Suffolk in the business of retail, commercial and other forms of banking activities. These include, but are not limited to, maintaining savings and checking accounts for the benefit of both individual and corporate depositors, making loans to individuals and to corporations, acting as trustee for the benefit of beneficiaries designated by their customers, acting at transfer agent for certain publicly held coroporations and performing other services normally associated with the banking business.

8. Wyman-Gordon is a business corporation engaged in the business of die forging, utilizing highly sophisticated metal forming techniques. Wyman-Gordon principally serves the aircraft and turbine engine industries. It has plants in Worcester, Grafton and Millbury, Massachusetts, and employs approximately 1,700 persons in Massachusetts.

9. Gillette is a business corporation engaged in the development, manufacture and sale of blades, razors, toiletries, grooming aids, writing instruments and other consumer products and service. It has plants in South Boston and Andover, Massachusetts, and employs approximately 6,000 persons in Massachusetts.

10. Digital is a business corporation engaged in the design, manufacture, sales and servicing of computers, computer systems, peripherals and associated computer accessories and other items and systems using digital techniques. It operates in a highly competitive market from which such major and well-established companies as RCA, General Electric, Singer and Xerox have elected to withdraw within the past five years. Digital has plants in Acton, Leominster, Marlborough, Maynard, Natick, Northboro, Springfield, Waltham, Westfield, Westminster, West Springfield, and Worcester, Massachusetts, and employs approximately 11,500 persons in Massachusetts.

11. There will be submitted to the voters of Massachu-

setts in the general election of November 2, 1976, a legislative amendment to the Constitution of the Commonwealth proposing to grant to the General Court the power and authority to impose a graduated income tax on personal incomes. The proposed legislative amendment neither imposes nor requires the imposition of a graduated income tax on individuals and does not purport to authorize the imposition of graduated taxes upon corporate income. A copy of the proposed amendment is appended hereto and marked "A". A copy of the Summary which will appear on the ballot is appended hereto and marked "B".

12. There is a division of opinion among economists as to whether and to what extent a graduated income tax imposed solely on individuals would affect the business and assets of corporations.

13. It is the position of the management of plaintiffs that a graduated income tax (and thus the proposed Constitutional Amendment) would adversely affect their business and property. None of the plaintiffs have communicated with their shareholders on this matter except as is stated in Paragraph 63.

14. It is the position of the management of plaintiff Banks that one way in which the graduated income tax would adversely affect their business and property is by discouraging persons of high ranking executive and middle management ability from settling, remaining, or working in Massachusetts, thus depriving the Banks of a source of high level executive and middle management talent.

15. As of April 13, 1976, there were 550 employees of First National earning $20,000 or more annually. Of these there are 207 employees earning $20,000 to $24,999, 96 employees earning $25,000 to $29,999, 137 employees earning $30,000 to $59,999 and 10 employees earning $60,000 to $191,000.

16. As of April 12, 1976, there were 175 employees of

Merchants earning $20,000 or more annually. Of these there are 134 employees earning $20,000 to $30,000, 33 employees earning $30,000 to $40,000 and eight employees earning $40,000 to $140,000.

17. It is the position of the management of plaintiff Banks that the graduated income tax would adversely affect their business and property by tending to reduce the total balance of individual checking and savings account deposits. As of April 13, 1976, First National had approximately:

126,000 individual checking accounts with an approximate balance of	$146,000,000
and	
137,000 individual savings accounts with an approximate balance of	$206,000,000

As of April 12, 1976, Merchants had approximately:

74,000 personal demand deposits with an approximate balance of	$ 53,500,000
and	
83,000 individual savings accounts with an approximate balance of	$137,700,000

18. It is the position of the management of plaintiff Banks that the graduated income tax would adversely affect their business and property by producing an adverse effect on the total of individual loans made by the Banks.

19. First National had approximately 209,000 individual loans outstanding with an approximate balance of $227,139,000, as of April 13, 1976.

20. Merchants had approximately 77,000 personal loans outstanding, with an approximate balance of $73,000,000, as of April 12, 1976.

21. It is the position of the management of plaintiff Banks that the graduated income tax would adversely affect their business and property by tending to discourage business from settling or remaining in Massachusetts, with resultant adverse effects on the Banks' industrial loans, deposits, and other services.

22. First National had approximately 6,000 industrial and corporate loans outstanding, with an approximate ballance of $1,872,000,000, as of April 13, 1976.

23. Merchants had commercial loans outstanding with an approximate balance of $569,300,000 as of April 12, 1976.

24. First National had approximately 29,000 industrial and commercial deposits accounts, with an approximate balance of $897,000,000 as of April 13, 1976.

25. Merchants had approximately 14,000 commercial deposit accounts with an approximate balance of $358,889,000 as of April 12, 1976.

26. Plaintiff Banks maintain their headquarters in Suffolk County, Massachusetts. They have no branch offices in any other state, or in any Massachusetts county other than Suffolk.

27. In 1972, First National expended or contributed $3,000 to oppose a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax.

28. In 1972, Merchants expended or contributed $3,000 to oppose a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax.

29. It is the position of the management of Wyman-Gordon that the graduated income tax (and thus the proposed Constitutional Amendment) would adversely affect its business and property in the following ways, among others:

a. it would tend to discourage persons of high ranking executive ability from settling or remaining in Massachusetts, thus depriving Wyman-Gordon of a source of high level executive talent, and
b. it would tend to discourage highly skilled and trained, and thus highly paid, engineering and technical specialists from settling in or remaining in Massachusetts, thus depriving Wyman-Gordon of a source of talent necessary for it to conduct its business.

30. Wyman-Gordon's total number of employees at its Massachusetts plants varies through the years, but remains approximately in the 1,700-2,000 range. The total payroll for these employees annualized from April 13, 1976, is approximately $27,000,000.

31. As of April 13, 1976, there were presently 206 employees of Wyman-Gordon earning $20,000 or more. Of these there were 133 junior executives and technicians earning $20,000 to $25,000, 36 executive and technical personnel earning $25,000 to $30,000, and 37 executives earning $30,000 or more. The highest salary paid is $130,000.

32. In 1972, Wyman-Gordon expended or contributed $3,000 to oppose a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax.

33. It is the position of the management of Gillete that the graduated income tax (and thus the proposed Constitutional Amendment) would adversely affect its business and property by tending to discourage persons of high ranking executive and middle management ability from settling or remaining in Massachusetts, thus depriving Gillette of a source of high level executive and middle management talent, and by tending to shrink disposable income of individuals available for the purchase of consumer products.

34. Gillette's total number of Massachusetts employees

is approximately 6,000 and the total annual payroll for these employees was approximately $73,800,000 in calendar year 1974, out of a total United States payroll of $108,200,000.

35. As of April 16, 1976, there were 857 employees at Gillette earning $20,000 or more. Of these there are 574 employees earning $20,000 to $30,000, 226 employees earning $30,000 to $50,000, and 57 employees earning more than $50,000.

36. Gillette's net sales in Massachusetts during the calendar year 1974 were $39,600,000, as against total net sales of $517,700,000 in the United States for the same period.

37. Gillette owned tangible property in Massachusetts worth $30,000,000 in 1974 and leasehold improvements in Massachusetts worth $1,500,000 in calendar year 1974.

38. In 1972 Gillette expended or contributed $3,000 to oppose a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax.

39. It is the position of the mangement of Digital that the graduated income tax (and thus the proposed Constitutional Amendment) would adversely affect its business and property in the following ways, among others:

a. it would impair Digital's ability to attract executive, technical and other skilled professional people to Massachusetts, and
b. the number of Massachusetts-based employees wishing to relocate to Digital facilities in New Hampshire, Arizona and elsewhere would increase.

40. Digital's total number of Massachusetts employees as of April 15, 1976, was 11,500. The total annual payroll for these employees for calendar year 1975 was approximately $131,000,000.

41. As of April 15, 1976, there were 1,207 employees at

Digital earning $20,000 or more. Of these there were 1,054 employees earning between $20,000 and $30,000, 142 employees earning between $30,000 and $50,000, and 11 employees earning over $50,000.

42. Digital's net sales of products and services to customers in Massachusetts for calendar 1975 was $27,300,000.

43. In 1972, Digital expended or contributed no monies to oppose a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax.

44. Plaintiffs intended to expend monies to publicize by paid advertisements in newspapers and other media their contentions with respect to the graduated income tax and the proposed Constitutional Amendment in an attempt to persuade the voters of Massachusetts to defeat the proposed Constitutional Amendment at the general election.

45. First National desires to, and but for G.L. c. 55 §8 would, place messages in its own in-house monthly newspaper called *About the First*. The purpose of such messages would be to attempt to persuade its own employees to vote against the proposed Constitutional Amendment. This publication is printed by First National solely for its own employees and is mailed to approximately 5,300 employees at their home addresses. Space in the said newspaper is a thing of some value, and it costs money to publish this paper. However, First National has not and will not place such messages in the paper out of respect for the law and for fear of criminal prosecution for violation of the statute. The Attorney General has not indicated that he will prosecute First National for placing such messages in its own in-house newspaper.

46. First National employs four professional economists who frequently comment publicly on economic conditions in Massachusetts, and would, but for G.L. c. 55 §8, comment publicly on the effect a graduated income tax would

have on the Massachusetts economy. The Attorney General has not indicated that he will prosecute First National or the professional economists if the professional economists make such public comments.

47. Wyman-Gordon desires to, and but for G.L. c. 55 §8 would, express its views on the proposed Constitutional Amendment in its internal newsletter "Information for Management" distributed to 275 monthly-paid employees. It costs money to print this newsletter, and Wyman-Gordon has not and will not express its views on this matter in said newsletter out of respect for the law and for fear of criminal prosecution for violation of the statute. The Attorney General has not indicated that he will prosecute Wyman-Gordon for placing such messages in its own in-house newsletter.

48. Gillette desires to, and but for G.L. c. 55, §8 would, express its views on the proposed Constitutional Amendment to its employees through its "Gillette Company Newsletter" and other internal bulletins. It costs money to print and deliver these publications, and Gillette will not express its views on this matter in said publications out of respect for the law and for fear of criminal prosecution for violation of the statute. The Attorney General has not indicated that he will prosecute Gillette for placing such messages in its own internal publications.

49. Digital desires to, and but for G.L. c. 55 §8 would, express its views on the proposed Constitutional Amendment to its employees through "Digital This Week", an internal newsletter distributed weekly to employees, and through "On Line", a quarterly magazine mailed to employees at their home addresses. It costs money to print and distribute these publications, and Digital will not express its views on this matter in said publications out of respect for the law and for fear of criminal prosecution for violation of the statute. The Attorney General has not

indicated that he will prosecute Digital for placing such messages in its own internal publications.

50. There is appended hereto a two-page document marked "C". The said document lists certain Real Estate Investment Trusts which are organized under the laws of Massachusetts, and sets forth certain financial and other information concerning these trusts.

51. The total assets of the Real Estate Investment Trusts shown on Exhibit "C" are approximately $5,458,901,000.

52. The total "Gross Income" for the said trusts is approximately $402,829,000. This is an annual gross income figure which reflects the latest reported accounting of the varied fiscal years of each of the REITS on the list.

53. There are many other business trusts organized under the laws of Massachusetts, although no income or asset statistics on said business trusts are readily available to the parties. The Massachusetts Secretary of State's records show 7,500 Massachusetts business trusts have filed reports in accordance with G.L. c. 182 §2 as of April 1, 1976.

54. During 1972, the most recent year for which income statistics are available, the Statistical Abstract of the United States shows that there are 15,000 Massachusetts partnerships which earned a total of $1,816,000,000 in business receipts.

55. The Department of Labor and Industries, *Directories of Labor Organizations in Massachusetts* (1975) lists 2,250 individual local labor organizations in the state with a membership of 590,625.

56. In a joint session of the two branches held July 2, 1969, the General Court approved a proposed amendment to the Massachusetts Constitution which purported to

authorize the imposition of a graduated income tax. The proposed amendment received two hundred four (204) votes in the affirmative and forty-nine (49) in the negative.

57. In a joint session of the two branches held May 12, 1971, the General Court approved a proposed amendment to the Massachusetts Constitution which purported to authorize the imposition of a graduated income tax. The proposed amendment received two hundred forty-five (245) votes in the affirmative and twenty (20) in the negative.

58. On November 7, 1972, the proposed amendment to the Massachusetts Constitution which purported to authorize the imposition of a graduated income tax was submitted to the voters of the Commonwealth at the Biennial State Election. A total of two million five hundred three thousand four hundred ninety-four (2,503,494) ballots were cast at that election. Three hundred thirty-five thousand eight hundred twenty-five (335,825) blank ballots were recorded on the graduated income tax amendment. The proposed amendment was rejected by the voters. It received one million four hundred fifty-five thousand six hundred thirty-nine (1,455,639) votes in the negative and seven hundred twelve thousand and thirty (712,030) votes in the affirmative.

59. On June 6, 1972, the Committee for Jobs and Government Economy was organized as a non-elected political committee with a purpose of supporting or opposing tax proposals which would influence the state's economy. The Committee for Jobs and Government Economy raised and expended approximately one hundred twenty thousand dollars ($120,000) in opposition to the proposed graduated income tax amendment as indicated in copies of the financial reports filed by the Committee which are appended hereto and marked "D". The Committee for Jobs and

Government Economy was the only duly organized non-elected political committee to raise and expend money to oppose the proposed amendment.

60. On September 22, 1972, the Coalition for Tax Reform, Inc., was organized as a non-elected political committee with the stated purpose of promoting passage of the proposed graduated income tax amendment. The Coalition for Tax Reform, Inc., raised and expended approximately seven thousand dollars ($7,000) to promote the proposed amendment, as indicated in copies of the financial reports filed by the Coalition which are appended hereto and marked "E". The Coalition for Tax Reform, Inc., was the only duly organized political committee to raise and expend money to promote the proposed amendment.

61. Forty-one (41) states and the District of Columbia impose income taxes on personal income. Thirty-six (36) states and the District of Columbia have graduated income taxes.

62. The boards of directors of all of the plaintiff corporations were notified of the commencement of this action. The boards of directors of three of the plaintiffs formally ratified the commencement of the action.

63. At the annual meeting of stockholders of First National Boston Corporation, which is the parent of the plaintiff First National, held on March 18, 1976, in response to a question on the proposed graduated state income tax, the management of First National responded, in part, that as presently proposed, its economists feel that a graduated tax would affect the entire middle-management group and that it was already hard enough to keep businesses from moving out of the state. The question and response were reprinted in the Questions & Answers section of the Summary Report of the Annual Meeting, which was mailed to all shareholders.

The parties have agreed that the facts recited in the Statement of Agreed Facts are true. Plaintiffs and the defendant do not necessarily agree with each other as to the relevance of each fact. Plaintiffs and the defendant each reserve the right to argue as to the relevance, or lack of relevance, of any particular fact set forth herein.

/s/FRANCIS H. FOX
FRANCIS H. FOX
BINGHAM, DANA & GOULD
Attorneys for the Plaintiffs

FRANCIS X. BELLOTTI
Attorney General
By THOMAS R. KILEY
THOMAS R. KILEY
Assistant Attorney General

"A"

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Seventy-five

PROPOSAL FOR A LEGISLATIVE AMENDMENT TO THE CONSTITUTION AUTHORIZING THE GENERAL COURT TO IMPOSE AND LEVY A GRADUATED TAX ON PERSONAL INCOME AND TO BASE SUCH TAX UPON THE FEDERAL INCOME TAX.

A majority of all the members elected to the Senate and House of Representatives, in joint session, hereby declares it to be expedient to alter the Constitution by the adoption of the following Article of Amendment, to the end that it may become a part of the Constitution [if similarly agreed to in a joint session of the next General Court and approved by the people at the state election next following]:

ARTICLE OF AMENDMENT

ART. . As an alternative to levying a tax on incomes in the manner provided in Article XLIV of the Amendments to the Constitution, the General Court shall have full power and authority to levy a tax on personal incomes at rates which are graduated according to the total amount of income received, regardless of the sources from which it may be derived, and to grant reasonable exemptions, deductions, credits and abatements to such tax. Further, the General Court may define the tax liability or the total income upon which such tax is levied or the graduated rates at which it is taxed by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time and may prescribe reasonable exceptions to and modifications of such provision.

IN JOINT SESSION, August 15, 1973.

The foregoing legislative amendment of the Constitution

is agreed to in joint session of the two houses of the General Court, said amendment having received the affirmative votes of a majority of all the members elected; and it is referred to the next General Court in accordance with a provision of the Constitution.

(s) (Illegible)
Clerk of the Joint Session.

IN JOINT SESSION, May 7, 1975

The foregoing legislative amendment is agreed to in joint session of the two houses of the General Court, said amendment having received the affirmative votes of a majority of all the members elected; and this fact is hereby certified to the Secretary of the Commonwealth, in accordance with a provision of the Constitution.

(s) EDWARD B. O'NEILL
Clerk of the Joint Session.

SECRETARY OF STATE
May 29 11:12 AM '75
ELECTION DIVISION

"B"

QUESTION 2

The proposed amendment would authorize, but not require, the Legislature to modify the personal income tax laws of Massachusetts by the use of graduated rates instead of the present flat or uniform rates. The graduated rates would be based on the total amount of income received, without distinguishing between earned and unearned income. The Legislature would also be authorized to provide for reasonable exemptions, deductions and abatements and could base any such graduated income tax provision on provisions of Federal income tax law.

"C"

20 LARGEST REAL ESTATE INVESTMENT TRUSTS IN MASS.*

	Name	Fiscal Year	Total Assets	Gross Income
1	Chase Manhattan Mortgage & Realty Trust, Boston	1975	$940,643,000.	$38,079,000.**
2.	Continental Mortgage Investors, Boston	1975	$729,050,000.	$58,225,000.
3.	Connecticut General Mortgage and Realty Inc., Springfield	1975	$442,000,000.	$41,361,000.
4.	Diversified Mortgage Investors, Boston	1975	$373,984,000.	$28,816,000.
5.	Equitable Life Mortgage & Realty Investors, Boston	1975	$358,961,000.	$32,555,000.
6.	C.I. Mortgage Group, Boston	1975	$324,735,000.	$20,602,000.
7.	Massmutual Mortgage & Realty Inv., Springfield	1975	$231,038,000.	$18,604,000.
8.	North American Mortgage Investors, Boston	1975	$212,478,000.	$20,939,000.
9.	Cabot,Cabot & Forbes Land Trust, Boston	1975	$206,169,000.	$13,846,000.
10.	Security Mortgage Investors, Boston	1975	$205,029,000.	$11,621,000.
11.	First Pennsylvania Mortgage Trust, Boston	1975	$188,758,000.	$ 9,702,000.
12.	Institutional Investors Trust, Boston	1975	$186,468,000.	$11,951,000.
13.	C. I. Realty Investors	1975	$185,768,000.	$30,514,000.
14.	BT Mortgage Investors	1975	$170,316,000.	$ 9,889,000.
15.	Gulf Mortgage & Realty Inv., Boston	1975	$150,540,000.	$11,023,000.
16.	State Mutual Inv., Worcester	1975	$137,914,000.	$ 9,696,000.
17.	Barnes Mortgage Investment Trust, Boston	1975	$118,153,000.	$ 7,464,000.
18.	American Fletcher Mortgage Inv., Boston	1974	$114,473,000.	$ 7,617,000.
19.	Hubbard Real Estate Investment, Boston	1975	$ 94,993,000.	$ 8,784,000.
20.	TMC Mortgage Investors, Boston	1974	$ 87,431,000.	$11,541,000.

* American Banker, Vol. CXL No. 191, Oct. 2, 1975
** Figures supplied by National Association of Real Estate Investment Trusts, 1101 Seventeenth St., N.W. Washington, D.C. 20036

[In designating the appendix the parties have been guided by Supreme Court Rule 36(2) and the admonition of the Court to designate only the most significant portions of the record. The parties have omitted, for instance, attachments D and E to the Statement of Agreed Facts which are referred to in paragraphs 59 and 60 thereof and which consist of copies of the campaign finance reports of committees organized to favor and oppose a 1972 Massachusetts ballot question proposing a graduated income tax. Those reports appear at pages A-47 through A-113 of the Record Appendix submitted to the Supreme Judicial Court.]

[It is agreed by the parties, with reference to paragraphs 59 and 60 of the Statement of Agreed Facts, that the documents set forth herein as exhibits "A" and "B" were submitted to the Supreme Judicial Court as an appendix to the brief of two intervening defendants (Coalition for Tax Reform, Inc. and United Peoples, Inc.), which two entities are no longer parties to this case.]

"EXHIBIT A"

MASSACHUSETTS LAW REFORM INSTITUTE
2 PARK SQUARE
BOSTON, MASSACHUSETTS 02110
AREA CODE 617
482-0890

May 10, 1976

Mr. Peter F. Rousmaniere
242 Clark Road
Brookline, Massachusetts 02146

Re: *GIT finances, 1972*

Dear Peter:

I need your help right away in finding out (1) what was received, (2) what was expended and (3) what of these was, if anything, not reported to the Secretary of State by Coalition for Tax Reform with respect to the 1972 GIT campaign.

Enclosed herewith are copies of pages A-41 and A-42 of the record appendix in the *First National Bank* (II) case, wherein the corporations (again) seek to have invalidated the election law provision prohibiting corporate contributions to the GIT campaign. The relevant paragraphs 59 and 60 of the statement of facts agreed to by the plaintiffs and the AG, state that CTR spent only approximately *$7,000* on the campaign.

But I thought the true figure was closer to *$15,000!*

Enclosed also are copies of pages A-85 through A-113 (less duplications and blank pages) which purport to be the back-up for the conclusion that CTR spent only $7,000.

Please examine this material, whatever records you have and, if necessary, whatever records others (Julie Perkins of LWV; Cathy Keefe of Common Cause/Mass..)

may have and tell me quickly the answers to these questions:

1. What did CTR *receive* with respect to the 1972 campaign?
2. What did CTR *spend* with respect to the 1972 campaign?
3. What are the details supporting your answers *not* accounted for in the copies enclosed of S/S records?

Since CTR will probably be granted conditional intervener status in this case (i.e., we may be able to add a little to the stipulation of "facts" and we will be able to brief and argue the case), we cannot allow the case to be submitted to the court on false facts.

This is important. Please call me right away.

Sincerely yours,
ERNEST WINSOR

EW:fl
Enclosures
xc with enclosures: DIANE KESSLER, MCC
JULIE PERKINS AND FLORENCE RUBIN, *LWV*
CATHRYN KEEFE, *Common Cause/ Mass.*
BARBARA A. SMITH

"EXHIBIT B"

Peter F. Rousmaniere
242 Clark Rd.
Brookline, Mass. 02146
May 20, 1976

Mr. Ernest Winsor,
Massachusetts Law Reform Institute,
2 Park Sq.,
Boston, Mass. 02116
Dear Tony,

I have received and reviewed your letter dated May 10, 1976. I have examined the pertinent documents, and although my examination is not complete, I believe that the information I submit to you in this letter is reliable.

All receipts and disbursements of the Coalition for Tax Reform, Inc., between August, 1971, and August, 1973, were handled through a checking account at the National Shawmut Bank, acct. #046-876-2. These receipts and disbursements summarize the Coalition's financial operations with respect to the graduated income tax campaign and, to a limited degree, its on-going activities in the area of tax reform.

Receipt of funds for the 1972 campaign.

I have included a table which identifies the date and amount of bank deposits, the recognition or non-recognition of the deposit in statements filed by me with the Secretary of State, and the amount of understatement of deposits if any.

It is clear that the photocopied statements filed with the Secretary of State which you provided me significantly understate actual deposits. Also, statements as you provided them to me are not available for some periods in 1972 and all periods in 1973.

At the present time, I cannot determine why actual deposits were not reported in a timely fashion to the Secretary of State. I wish to note that, at the time, considerable confusion existed within the Secretary of State's office regarding the guidelines for filing of such statements.

Disbursement of funds for the 1972 campaign.

I have included a table which identifies by period disbursements the recognition or non recognition of the disbursements in statements filed by me with the Secretary of State, and the amount of understatement of disbursements if any.

As in the case of receipts, I cannot determine at the present time the cause of the discrepancies.

Yours very truly,
PETER F. ROUSMANIERE

Examination of Receipt of Funds by the Coalition for Tax Reform, Inc.

Date of Deposit	*Amount per Bank*	*S/S Statement*	*Amount per Statement*	*Understatement*
various dates pre 9/7/72	3,968.25	On or before 9/15/72	3,956.25	12.00
9/13/72	459.00	"	none	459.00
10/16/72	1,947.50	10/1 – 10/20/72	1,942.50	5.00
10/31/72	5,313.00	10/20 – 11/ 5/72	none	5,313.00
11/28/72	563.00	11/15 – 11/30/72	563.00	———
various dates 1/5/73 - 8/31/73	2,276.00	no statements	none	2,276.00
TOTALS:	14,526.75		6,461.75	8,065.00

Examination of Disbursement of Funds by the Coalition for Tax Reform, Inc.

Period of Disbursement	*Amount per Bank**	*S/S Statement*	*Amount per Statement*	*(Over) – under-statement*
on or before 9/15/72	2,508.42	on or before 9/15/72	3,328.91	(820.49)
9/16 – 9/30	none	9/16 – 9/30	795.35	(795.35)
10/1 – 10/20	1,149.16	10/1 – 10/20	362.05	787.11
10/21 – 11/05	2,634.02	10/21 – 11/05	none	2,634.02
Jan. Aug., 1973	8,216.11	no statements	none	8,216.11
TOTALS	14,507.71		4,486.31	100,211.40

* Checks cleared and bank charges.

In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON, ET AL.,
APPELLANTS,

v.

FRANCIS X. BELLOTTI,
ATTORNEY GENERAL, ET AL.,
APPELLEES.

MOTION OF ASSOCIATED INDUSTRIES OF MASSACHUSETS, INC. AND OTHERS FOR LEAVE TO FILE A BRIEF

By their Attorney,
HENRY PAUL MONAGHAN
765 Commonwealth Avenue
Boston, Massachusetts 02215

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In the
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No.

THE FIRST NATIONAL BANK OF BOSTON, ET AL.,
APPELLANTS,

v.

FRANCIS X. BELLOTTI,
ATTORNEY GENERAL, ET AL.,
APPELLEES.

MOTION OF ASSOCIATED INDUSTRIES OF MASSACHUSETS, INC. AND OTHERS FOR LEAVE TO FILE A BRIEF

Associated Industries of Massachusetts, Inc., Greater Boston Chamber of Commerce and The Massachusetts Taxpayers Foundation, Inc., move, in accordance with Rule 42, for Leave To File a Brief in support of jurisdiction in the above entitled case. In support of this motion, movants represent:

1. Appellee Attorney General of Massachusetts has assented to this brief.

2. In this case, the supreme judicial court of Massachusetts has upheld the constitutionality of a Massachusetts statute which in specific terms bars business corporations from spending corporate funds to oppose a graduated personal income tax. The state court took the position that a corporation has free speech rights only insofar as the speech involved is demonstrated to affect its business or property; and that there was no such proof here, because the parties stipulated that the economists were divided on whether enactment of graduated personal income tax would so affect any corporation.

3. The specific holding in this case as well as its general theory of the extent to which corporations have free speech rights is of enormous importance to the movants herein. Movants are completely opposed to the view that the present restriction upon corporate opposition to a graduated personal income tax is constitutional. They believe that a graduated personal income tax would have a substantial adverse effect upon business corporations in Massachusetts and ultimately upon the economic situation in Massachusetts. They thus show the important and widely based concern for the position asserted by appellants. More generally, they have an interest far transcending this case in terms of the restrictive view of the state courts on the free speech rights of corporations, and the style, format and emphasis of their arguments on this issue may differ from that of appellants.

4. The movants are as follows:
   (a) Associated Industries of Massachusetts, Inc., is a non-profit corporation with approximately 2,500 manufacturing member companies located throughout the Commonwealth. The Association, whose member companies employ the major portion of Massachusetts manufacturing employees,

is the recognized spokesman for manufacturing industry in the Commonwealth. Its purposes include: improving the economic climate of Massachusetts in the public interest and advocating fair and equitable legislation and other public policies affecting the interest of its members and their employees.

   (b) The Greater Boston Chamber of Commerce is a widely based business organization duly established under the laws of this Commonwealth as a nonprofit organization with approximately 1,500 members. Its purpose is to protect and promote the commercial, industrial and public interest of Boston and the greater Boston metropolitan area.

   (c) The Massachusetts Taxpayers Foundation, Inc., is a nonprofit corporation with approximately 1400 members representing business corporations, financial institutions, members of the professions and individuals who are concerned with the problems of taxation and public expenditure at both the state and local levels. The Foundation is a recognized spokesman for the Massachusetts taxpayer, files and supports legislation, and publishes research reports and papers on virtually all facets of public finance and taxation.

By their Attorney,

HENRY PAUL MONAGHAN
765 Commonwealth Avenue
Boston, Massachusetts 02215

In the Supreme Court of the United States

OCTOBER TERM, 1976

No.

THE FIRST NATIONAL BANK OF BOSTON, ET AL.,
APPELLANTS,

v.

FRANCIS X. BELLOTTI,
ATTORNEY GENERAL, ET AL.,
APPELLEES.

BRIEF OF AMICI CURIAE IN SUPPORT OF JURISDICTION

Interest of the Amici Curiae

The interest of the amici is described in the motion for leave to file this brief.

Statement of the Case

Stripped of unessentials, the crucial facts are readily summarized. G.L. c. 55, §8 forbids business corporations from expending any monies to communicate their views *on state ballot questions* unless those questions materi-

ally affect their "property business or assets"[1] But §8 goes on to provide specifically that "[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions" of *individuals* "shall be deemed materially to affect . . . [a] corporation." The constitutional validity of this limiting proviso is at issue here.

The November 2, 1976 Massachusetts ballot contained referendum question #2 which proposed adding an amendment to the state constitution. This would authorize the state legislature to formulate a graduated income tax.[2] The First National Bank of Boston and four other corporations[3] wished to contribute to efforts to defeat that proposal, but were barred from doing so because of the §8 proviso. They thereupon commenced an original action in the state supreme judicial court against the attorney general seeking, *inter alia*, a declaration that the proviso denied them their federal constitutional guarantees of freedom of speech and equal protection. On September 22, 1976, the supreme judicial court entered a brief two-page order denying relief, squarely rejecting the federal claims. On February 1, 1977, the court filed its opinion.[4] So far as material here, the court rejected the federal claims on the ground that corporations do not have the same rights to free speech as natural persons; that they must show that

[1] The statute also prohibits the expenditure of funds to support the election of public officials.

[2] The current provisions of the state constitution forbid such legislation. *Mass. Const. Amend. Art. 44.* If the legislature proposes to amend the constitution, it must submit the proposed amendment to the voters. *Mass. Const. Amend. Art. 48,* Init. Pt. 4, §5.

[3] New England Merchants National Bank, The Gillette Company, Digital Equipment Corp. and Wyman-Gordon Co.

[4] The opinion is reproduced in the appellant's jurisdictional statement. The delay in the opinion occurred because the supreme judicial court has been at less than full strength because of resignations and illness. A timely notice of appeal has been filed.

their speech affects their business or property; and that no such proof was present here, the parties having stipulated that a division of opinion among economists existed on the issue. (Op. pp. 12-17).

On November 2, 1976 the Massachusetts voters defeated the proposed constitutional amendment.

Questions Presented

1. Is the case moot because the November 2, 1976 election has passed?

2. Insofar as it prevents corporations from expending funds to oppose a referendum on a graduated personal income tax is G.L. c. 55, §8 invalid as a denial of freedom of speech and equal protection of the laws?

The Questions Are Substantial

Point I. The Case Is Not Moot.

The specific occasion giving rise to this controversy has ended. The November 1976 election has come and gone and the referendum item pertaining to the graduated personal income tax has been defeated by the Massachusetts voters. Despite this fact, this appeal is not moot.

Article III requires that a "live controversy" exist at all stages of the litigation in the federal courts. E.g., *Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975). But it does not follow that because the specific controversy has ended, the case automatically becomes moot. For example, in *Super Tire Engineering Company* v. *McCorkle*, 416 U.S. 115 (1974), plaintiff's employers asserted that state welfare regulations entitling striking workers to welfare assistance were inconsistent with federal labor policy. This Court held that termination of the strike before trial did not moot the case,

because by its "continuing and brooding presence" (*id.* at 124) the state policy would affect the "ongoing collective [bargaining] relationship" between the parties. (*Id.* at 129.) See also *Scott* v. *Kentucky Parole Board*, 97 S.Ct. 342, 344 (1976) (dissenting opinion). More closely to the point here is the "capable of repetition, yet evading review" doctrine of *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). See *Sosna* v. *Iowa, supra*, 419 U.S. at 399-401. This doctrine recognizes that there is a class of cases which could be lost to this Court's review altogether because the specific underlying controversy would end before appellate review could be obtained, and that, so far as possible, article III should not be read to undercut the central function of this Court in giving "unity and coherence" to federal law. L. Jaffe, *Judicial Control of Administrative Action*, 589-90 (1965). This is particularly true in constitutional cases where this Court has a special function in the maintenance of the constitutional order,[5] a function around which, as Professor Bickel rightly observed, "[s]ettled expectations have formed." Bickel, *The Least Dangerous Branch*, 14 (1962).

The "capable of repetition yet evading review" doctrine is not an "exception" to article III. The *minimum* requirement of a "live controversy" is satisfied under this doctrine so long as there is a reasonable possibility that the issue is capable of repetition between the existing parties—so long, that is, as there is "a reasonable expectation that the same party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975).[6] Where this Court has been satisfied that it was impossible or highly improbable that the controversy could arise again

---

[5] Monaghan, *Constitutional Adjudication: The Who and When*, 83 Yale L.J. 1363, 1368-71 (1973).

[6] In class actions, if the suit were moot as to the named plaintiffs, the suit could nonetheless continue if the issue were likely to recur as to the members of the class, *Sosna* v. *Iowa, supra*.

between the specific parties the case has been held moot. E.g., *Weinstein* v. *Bradford, supra, DeFunis* v. *Odegaard,* 416 U.S. 312 (1974); *Craig* v. *Boren,* 97 S.Ct. — (1976). By contrast, however, jurisdiction has been sustained where there seemed a reasonable likelihood that the issue could recur. E.g., *Moore* v. *Ogilvie,* 394 U.S. 814 (1969); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972); and *Roe* v. *Wade,* 410 U.S. 113, 125 (1973). This fact is particularly evident in the context of first amendment claims. E.g., *Nebraska Press Ass'n* v. *Stuart,* 96 S.Ct. 2791, 2797 (1976).[7]

The *Southern Pacific Terminal* doctrine has undergone some transition over time. At one point it seemed that the requirement was simply that the *issue* could arise again, but recent decisions make clear that the issue must be capable of arising between the parties to the litigation.[8] *Weinstein* v. *Bradford, supra.* Moreover, in *Franks* v. *Bowman,* 96 S.Ct. 1251 (1976) the Court observed that the "yet evading review" aspect of the doctrine was "a self-imposed limitation of judicial restraint, not one of constitutional dimension." (96 S.Ct. at note 8 and related text.) The issue in *Franks* was one "capable of repetition" but not necessarily one "evading future review". Nonetheless, both the majority and dissenting opinions were in agreement that the issue was properly before the Court.[9] On both principle and authority it seems clear that all that is constitutionally required under article III to avoid mootness is that the issue be reasonably capable of repetition between the parties.

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[7] See also the Court's liberal construction of the final judgment rule of 28 U.S.C. §1257 where review of free speech claims might otherwise be lost. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 477-86 (1975).

[8] Monaghan, *supra* note 5 at 1385 n.142.

[9] *Franks* was, to be sure, a class action, but that is irrelevant. *Southern Pacific* is not a doctrine uniquely related to class actions. It can be invoked by a single plaintiff, or by a class if the issue is moot as to the named plaintiff.

This Court has been particularly willing to apply the *Southern Pacific Terminal* in election law cases, and accordingly, has repeatedly sustained its jurisdiction although the specific election had been ended. E.g., *Moore* v. *Ogilvie,* 394 U.S. 814, 816 (1969); *Dunn* v. *Blumstein,* 405 U.S. 330, 333 n.2 (1972); *Rosario* v. *Rockefeller,* 410 U.S. 752, 756 n.5 (1973). *Storer* v. *Brown,* 415 U.S. 724 (1974) is particularly instructive here. *Storer* presented various challenges to the California election laws relating to the placement of independent federal office candidates on the California ballot. The Court addresses the mootness question in a footnote which reads in its entirety as follows:

> "The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is 'capable of repetition, yet evading review.' [Citations omitted.] The 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." (*Id.* at 737 n.8.)

In the only cases in which mootness claims have been sustained in the election context it has been because of factors *other than the passing of the election.*[10]

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[10] *Golden* v. *Zwickler,* 394 U.S. 103 (1969) (congressman, target of election handbills, appointed to bench); *Brockington* v. *Rhodes,*

We submit that the present case is controlled by the *Storer* principles.

1. G.L. c. 55, §8 imposes a fixed duty upon the plaintiffs. They are under a *continuing* duty not to make the expenditures sought here.[11] E.g., *Roe* v. *Wade, supra* (plaintiff under a continuing duty not to undergo proscribed abortions). Moreover, the state policy is fixed and definite; it "is not contingent upon executive discretion". *Super Tire Engineering Corp.* v. *McCorkle, supra,* 416 U.S. at 124. And the attorney general has consistently taken the view that the statute will be enforced. Indeed, even if a subsequent attorney general were of the opinion that the §8 proviso was invalid he could not reasonably interpose his judgment given the decision of the supreme judicial court in this case upholding the statute.[12]

2. There is, moreover, a reasonable likelihood of the recurrence of this problem between the parties. This "likelihood" is a matter not to be brushed aside on a generalized premise that there may never be another referendum question dealing with the graduated personal income tax, any more than this Court brushed aside the plaintiffs in the cited election cases because they might never be concerned with a future election. That contingency did not moot the

396 U.S. 41, 43 (1969) ("limited nature of the relief sought". Plaintiff sought mandamus to certify him as a candidate.) *Hall* v. *Beals,* 396 U.S. 45 (1969) (because of intervening change in state law plaintiff not a representative of class he sought to represent).

[11] Compare *Weinstein* v. *Bradford, supra* (attack on parole board procedures; prisoner released from custody). *DeFunis* v. *Odegaard, supra* (attack on law school admission procedures; plaintiff to graduate from law school). *Craig* v. *Boren, supra* (male plaintiff complaining of gender based discrimination against males under 21 became 21). In each of these cases subsequent events released the plaintiffs forever from the effects of the disabilities which they had initially challenged.

[12] Compare *Spomer* v. *Littleton,* 414 U.S. 514 (1974) holding moot a suit challenging the misconduct of a state's attorney absent allegations that his successor would continue the same policies.

election plaintiffs' claim, and it should not moot this case. Moreover, on the issue of recurrence, here, as elsewhere, the teachings of history, not logic, are important. Holmes, *The Common Law,* 1 (1881). Massachusetts elections in the last decade and a half have witnessed regular attempts to obtain approval of a graduated personal income tax amendment. Finally, there is powerful and continuing political support inside the Commonwealth for a graduated income tax. The nature of that support is indicated most clearly from the brief of the intervening defendants filed in court below. We quote paragraph 3 of its statement of facts:

> "(3) The intervening defendant Coalition for Tax Reform, Inc. (CTR) is a non-profit corporation organized and existing under the laws of Massachusetts. CTR is a so-called 'umbrella' organization of individuals and other membership organizations, set up for the primary purpose of working for passage of the graduated income tax amendment to the state constitution. Its member organizations include the League of Women Voters, the Massachusetts Teachers Association, Americans for Democratic Action, Massachusetts Fair Share, Inc., Common Cause, National Association of Social Workers, Massachusetts Council of Churches, United Peoples, Inc., and others. CTR was the principal advocate of the graduated income tax (GIT) in the 1972 referendum campaign and expects it will be the principal advocate in the 1976 campaign.

3. The validity of §8's proviso seems to be one "evading review". Both the attorney general and the intervening defendants, for example, assert that a trial and findings of fact are necessary on the issue whether a referendum with respect to a graduated income tax would, in fact

materially affect a corporation's business.[13] The trial envisaged by the intervening defendants is obviously complicated; it necessarily requires testimony with respect to generalized economic and social matters, not with respect to "adjudicative" facts. Following that trial there would presumably be an opinion by the judge, followed by subsequent proceedings in the state supreme court, and finally an appeal to this Court. While one cannot speak with certainty, it is exceedingly doubtful that the case envisaged by the intervenors could be developed fully in time to be presented and decided by this Court in time to affect any specific ballot referendum. Even if a full factual record is not required, as plaintiffs contend, the same seems true. Plaintiffs, if they are not to be faced with ripeness difficulties, must wait until the referendum is certified for the ballot. *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21 (1974). *O'Shea* v. *Littleton*, 414 U.S. 488, 495-98 (1974). And litigation is a time-consuming process.[14]

In any event, we submit that the "evading review" component of the *Southern Pacific Terminal* doctrine is a matter of judicial discretion, not one of article III dimension.

Accordingly, we submit that this case is not moot. At the minimum, the mootness issue itself is substantial enough to warrant fuller consideration in the context of briefs on the merits.

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[13] This case was submitted on an agreed statement of facts in which the parties simply asserted their beliefs on this issue, and that economists were divided on the issue (Op. p. 17).

[14] Moreover, the heavy penalties for violation of §8 statute discourages challenges to the statute by way of a violation. Statutes of this character are particularly threatening to first amendment interests. Freund, *The Supreme Court of the United States: Its Business, Purpose and Politics*, 65 (1961). In any event, first amendment considerations strongly favor prospective relief here, particularly since there are no countervailing federalism considerations. Monaghan, *First Amendment Due Process*, 83 Harv.L.Rev. 517, 547-49 (1970).

POINT II. G.L. c. 55, §8, VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

If the content restriction contained in the §8 proviso were imposed upon individuals, its invalidity would be too plain for argument. *Buckley* v. *Valeo*, 424 U.S. 1 (1976). That much was conceded in the court below. Nonetheless, various arguments were made that the proviso was valid as applied to business corporations. This argument was, in turn, grounded upon the premise that business corporations lack significant free speech protection.

The constitutional guarantee of freedom of speech is, of course, part of the "liberty" secured to all "persons" by the due process clause of the Fourteenth Amendment. That corporations are "persons" within the meaning of the amendment was considered too clear for argument nearly a century ago. *Santa Clara County* v. *Southern Pacific Railroad*, 118 U.S. 394, 397 (1886). Accordingly, the reports of this Court are replete with decisions in which corporations have successfully urged freedom of speech claims. E.g., *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975). Nor, as was suggested below, is the right to full protection restricted to corporations engaged in the business of disseminating information. For example, corporate employers have long been recognized as possessing a constitutional right to freedom of speech in connection with opposition to labor union organization. *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 617-618 (1969).[15] So too have bars urging that restrictions upon topless dancing violate the constitution. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975) (plaintiffs are "three corporations which operate bars within the town").

---

[15] See also the first amendment protection accorded to labor unions even though their principal activity is not the dissemination of ideas. E.g., *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576 (1971).

More recently, this Court has held that commercial speech is also within the ambit of the first amendment. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumers' Council*, 425 U.S. 748 (1976). No serious contention could be made that *Virginia Citizens'* constitutional protection for truthful advertising is unavailable to corporations. See, for example, the cases cited at 425 U.S. at 764-65, and *Beneficial Corp.* v. *FTC*, 542 F.2d 611 (3rd Cir. 1976).[16] The argument that only corporations engaged in the business of disseminating ideas possess full free speech protection is without any textual or decisional support; it is, moreover, wholly unresponsive to any conceivable conception of the first amendment, which seeks to protect the interest of both the speaker and his audience. *Virginia Citizens Consumer's Council, Inc., supra*, 425 U.S. at 756-57.

The teaching of the foregoing cases is plain. Corporations have the right of free speech, as part of the "liberty" secured to them by the due process clause. That right is *not* granted by state law, any more than a corporation's right to freedom from unreasonable search and seizure or to equal protection of the laws.[17] Accordingly, the crucial question in this case must turn upon the weight of the state interest advanced in support of the particular statutory restriction on the constitutional freedom. No clear legislative history illuminates the justifications for §8 proviso, and only two grounds were advanced below. Each will be considered, in turn.

---

[16] See also the pre *Virginia Citizens Council* cases denying first amendment protection to corporations for commercial speech which are collected in 1 Emerson, Haber & Dorsen, *Political & Civil Rights in the United States*, 551-555 (4th ed. 1976), none of which remotely suggests that constitutional protection was denied because corporations, rather than individuals, were involved.

[17] *G. M. Leasing Corp.* v. *United States*, ___ U.S. ___ (1977), 45 U.S.L.W. 4098, 4103: "Nor can it be claimed that corporations are without some Fourth Amendment rights."

A.

The intervenors vigorously argued the proviso's real purpose is a fear that corporate wealth would "drown" out the voice of its opponents on the specific issue of a graduate personal income tax. That interest was not relied upon by the court. It is, moreover, plainly impermissible as to individuals under *Buckley* v. *Valeo*, 424 U.S. 1, 18-19, where this Court observed, *inter alia*, that

> "A restriction on the amounts of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."

See also *Schwartz* v. *Romnes*, 495 F.2d 844, 851 (2nd Cir. 1974). By what alchemy does a constitutionally impermissible interest suddenly become transformed into a constitutionally permissible one simply because the identity of the speaker changes from an individual to a corporation? There is simply "no justification for treating [plaintiffs] differently in these circumstances simply because [they are] corporations." *G. M. Leasing Corp.* v. *United States*, *supra*, note 17, 45 U.S.L.W. at 4103. Indeed, the *Buckley* condemnation applies *a fortiori* here. Section 8 is not an effort to restrict the *amount* of expenditures, as was the statute invalidated in *Buckley*, but the *content* of the speech no matter how little is in fact spent by the corporation.

Moreover, the corporate wealth justification cannot explain §8's patently underinclusive character. Other substantial aggregate of business wealth, such as real estate investment trusts (REIT's), partnerships,[18] and labor

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[18] It is stipulated that there are some 15,000 partnerships in the Commonwealth (J.S. p. ___).

unions are permitted to speak on this issue. The efforts were made to distinguish some of these situations,[19] but the attorney general conceded that REIT's (which have transferable shares) cannot be distinguished from corporations. There are 7,500 such business units in Massachusetts and they possess enormous wealth. (The twenty largest REIT's have assets in excess of 5 billion dollars (J.S. p. —).

Whatever may be the permissible range of state regulation based on the content of speech, see the discussions in *Young* v. *American Mini Theatres*, 426 U.S. — (1976), we are aware of no decision in this Court which would remotely support the regulation of the content here involved. In any event, the important character of the issue raised is apparent. Federal statutes, for example, impose substantial restrictions upon the political activities of both unions and corporations and their constitutionality remains to be adjudicated. See Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. of Chi. L. Rev. 148 (1974). Here, Massachusetts has imposed a substantial restriction upon corporate political activity and its validity *vel non* plainly presents an issue whose significance is far beyond the confines of this particular case.

B.

The only other ground advanced below in support of §8's proviso was plaintiffs failed to "prove" that in fact a graduated personal income tax would "affect" the business of a corporation. That was the ground adopted by the supreme judicial court (Op. pp. 13-17). That argument is

[19] The attorney general argued that partnerships can be distinguished because they exist independently of statutory permission. But they are subject to extensive regulation, see G.L. chapters 108 and 109 on partnership and limited partnerships. And unless *Lochner* v. *N. Y.*, 198 U.S. 45 (1905), is revived, partnerships could be prohibited entirely, or their existence made conditional upon receipt of a state license or charter.

not without its wry aspects. It was, after all, advanced by those not engaged in business, and opposed by the five corporate business plaintiffs in this case who are willing to expend funds in litigation to free themselves from the statutory restriction. Moreover, the plaintiffs are fully supported here by the amici which are comprised largely of business corporations.

In any event, the thrust of the "no affect" argument is apparently that if corporate speech in connection with the graduated income tax does not "affect" the corporation, it would be "ultra vires". Thus, the §8 proviso simply prohibits corporate management from straying from the purpose of the corporate charter.

The "no affect" argument rests upon the plainly false foundation. As the cases previously discussed (e.g., *Gissel, Conrad, Virginia Citizens Council*) make clear, that right is conferred not by state law but by the constitution of the United States. Moreover, it is not usually the case that the protected character of the federal right to speech depends upon a demonstration of its truth, *N.Y. Times* v. *Sullivan*, 376 U.S. 254, 271-74 (1964), particularly where, as here, the "truth" consists of judicial resolution of a claim that a graduated personal income tax will have an adverse effect on the businesses engaged in by Massachusetts corporations.[20] But in this respect we note that plaintiff corporations and the amici's belief that a graduated income tax would adversely "affect" their business operations is hardly irrational; indeed, the court below expressly acknowledged that the parties have stipulated that economists are divided on the issue.

Moreover, the §8 proviso cannot rationally be defended

[20] The only area where truth plays a substantial role in the protection afforded by the constitution to commercial speech. In holding truth to be an important factor the Court in *Virginia Citizens Council* assessed the special character of the governmental interests in that connection and the minimal impact of such a restriction on this class of speaker. (425 U.S. at 770-72, particularly note 24).

upon such a supposed *ultra vires* basis. Two of the plaintiffs are federally chartered banks (Op. p. 4) and it is not obvious what the authority of state law is to structure the ambit of their authority. More generally, the distinction between corporations and other business units makes no sense in light of such a purpose. Nor does § 8 even maintain a consistent policy with respect to business corporations. Nothing prohibits Massachusetts business corporations from now engaging in speech against the graduated income tax or from doing so while that issue is pending before the Massachusetts legislature, or even, as the state court recognized (Op. p. 19), when corporations are communicating to their stockholders about the referendum. That speech is forbidden *only* when the question leaves the legislative forum and is submitted to the people by way of a referendum. Why the instant at which the forum for discussion shifts to the people at large demonstrates that a corporation's opposition to a graduated income tax no longer legally "affects" it is, frankly, a mystery far too deep for us to penetrate.[21] The present statutory scheme is so irrational that it would deny business corporations equal protection of the laws even if no free speech interests were implicated. And, plainly, the discriminations worked by the §8 proviso are so unreasonably underinclusive that the proviso does not satisfy the strict scrutiny required when constitutionally protected interests are at stake. *Police Department* v. *Mosley*, 408 U.S. 92, 96-99 (1972).

In any event, the legislative determination that a referendum on the graduated income tax does not "affect" the corporation cannot be treated as conclusive, since the right to free speech stems from the Fourteenth Amendment, not

[21] The explanation, we think, lies in the dynamics of Massachusetts politics. The legislature has generally favored a state constitutional amendment permitting a graduated personal income tax, but these proposals have repeatedly lost on the ballot.

state, law. Put differently, plaintiffs recognize that the legislature has wide discretion but is not without limits. A state cannot impose unconstitutional conditions on a corporate charter, any more than it can on other statutory permission. *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922). See generally, Note, *Unconstitutional Conditions*, 73 Harv.L.Rev. 1595 (1960).[22]

What we have here is a plainly impermissible content discrimination. Out of a wide range of issues which a corporation might feel impelled to speak about, only one — the graduated state personal income tax — is excised and then only if it is before the people by way of a referendum. To repeat, whatever may be the permissible range of content discrimination, see *Young* v. *American Mini Theatres*, 426 U.S. — (1976), we are aware of no decision which would remotely support the restriction here involved. Any presumed legislative goal of ensuring that a corporation not act *ultra vires* is hardly of the "compelling" *Buckley* v. *Valeo*, 424 U.S. 1, 25, 66-68 (1976) or "paramount" (*Elrod* v. *Burns*, 96 S.Ct. 2673, 2684 (1976)) nature necessary to support a material interference with free speech rights, particularly one aimed directly at the content of speech.

[22] Clearly, therefore, a business corporate charter could not be conditioned upon a limitation that the corporation support the policies of the incumbent governor, or the views of the Democratic Party, or on support of a graduate income tax. Any such limitation, would be an unconstitutional condition violative of the constitutional guarantee of free speech. So here also, the §8 proviso is an unconstitutional condition upon the charter of the business corporations in Massachusetts.

Conclusion

Two courts have recently validated statutory restrictions on corporate political activity in connection with the ballot.[23] We submit, therefore, that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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[23] *C. & C. Playground Corp.* v. *John N. Hanson*, CV-76-81 (H) (D. Montana Sept. 13, 1976); *Pacific Gas & Electric Co.* v. *Berkeley*, 60 C.A. 3d 123, ___ Cal. Reptr. ___ (1976).

In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1172.

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION,
AND
WYMAN-GORDON COMPANY,
APPELLANTS,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
AND
COALITION FOR TAX REFORM, INC., AND UNITED PEOPLES, INC.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Motion to Dismiss or Affirm.

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THE FIRST NATIONAL BANK OF BOSTON,
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ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Motion to Dismiss or Affirm.

In accordance with the provisions of Rule 16 of the Supreme Court of the United States, the Attorney General

of Massachusetts (Appellee)[1] moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

Issues Presented and Statute Involved.

The issues presented are adequately expressed in the Amici Curiae Brief in Support of Jurisdiction and the statute involved is reproduced in the Jurisdictional Statement (pp. 3-4).

Statement.

This is a direct appeal from a final judgment of the highest court of the Commonwealth, holding that the provisions of Massachusetts General Laws (G.L.) c. 55, § 8, are constitutional both on their face and as applied to the plaintiffs in the case below.

The Appellants are five business corporations who wished to make contributions or expenditures to oppose a proposed amendment to the Massachusetts Constitution. If passed at the November 2, 1976, general election, the amendment would have authorized the imposition of a graduated state personal income tax. Appellants brought an action in the Single Justice session of the Supreme Judicial Court in April

[1]The Attorney General of the Commonwealth was the only named defendant in the original action. Two groups were subsequently permitted to intervene as parties defendant (App. 3, n. 5), but neither is represented by the Attorney General through this submission.

of 1976, seeking a declaration that G.L. c. 55, § 8, as amended by Mass. St. 1975, c. 151, § 1, unconstitutionally deprived them of their right to contribute or expend monies for that purpose. The case was submitted on Agreed Statements of Fact (App. 31-48) and reported without decision to the full bench of that court.

The case was heard on June 8, 1976, and on September 22 the court ruled (1) that business corporations enjoy a constitutional right to contribute or expend money to support or oppose ballot questions only when their business, property or assets are materially affected by the questions; (2) that in G.L. c. 55, § 8, the Massachusetts Legislature has clearly identified the parameters of corporate free speech, permitting, by the express terms of the statute's first sentence, corporate speech wherever it is constitutionally required; and (3) that the Appellants failed to demonstrate that they were materially affected by the graduated personal income tax amendment and that they were therefore not entitled to a declaration that the statute was unconstitutional as applied to them.[2]

On November 2, 1976, the voters of the Commonwealth rejected the graduated income tax amendment (App. 4). None of the Appellants made statutorily proscribed contributions or expenditures in opposition to the question and, thus, none currently faces prosecution under G.L. c. 55, § 8.

[2]The Appellee submits that the correctness of this holding is not properly presented by appeal under 28 U.S.C. § 1257(2). The basis for that holding was Appellants' failure to sustain the burden of proof on a petition for declaratory judgment under G.L. c. 231A (App. 14-15). This failure to satisfy a statutory burden of proof constitutes an independent and adequate non-federal ground for the holding, but is not itself broad enough to sustain the entire judgment of the state court. *Eustis* v. *Bolles*, 150 U.S. 361, 370 (1893).

Argument.

I. The Case Is Not "Capable Of Repetition, Yet Evading Review."

Both the Appellants and the Amici suggest that this case has not become moot on appeal. They argue that it falls within that narrow class of cases presenting important legal issues which should be decided even after the underlying dispute has terminated, because they are "capable of repetition, yet evading review." *Southern Pacific Terminal* v. *ICC*, 219 U.S. 498, 515 (1911). This exception to the doctrine of mootness is inapplicable, because (a) the challenged statute does not operate in too short a time frame for complete litigation, and (b) the issues are otherwise capable of review.

Although the Appellants did not bring this action until April of 1976, their cause of action existed at least as early as May 7 of the preceding year. On that date the Massachusetts General Court took the final legislative action necessary to place the graduated income tax amendment on the ballot. I Journal of the Senate 1409-12 (1975). At that time the 1975 amendment to G.L. c. 55, § 8, was also fully effective.[3] As the Supreme Judicial Court noted, the Appellants had control over the commencement of this litigation and could have sought declaratory relief in the spring of 1975, nearly eighteen months prior to the election (App. 15, n. 15). Thus, the limited period for review in this case may be seen as a direct consequence of the Appellants' trial strategy, rather than as a natural result of the election laws of the Commonwealth. *Compare*, *Roe* v. *Wade*, 410 U.S. 113 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972).

[3]St. 1975, c. 151, became effective on April 28, 1975.

Little is added to the mootness analysis by characterizing this as an election case. Concededly, the "capable of repetition, yet evading review" exception has been invoked in the past to sustain jurisdiction after the relevant election has passed. *American Party* v. *White*, 415 U.S. 767 (1974); *Storer* v. *Brown*, 415 U.S. 724 (1974); *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973); *Dunn* v. *Blumstein*, *supra*; *Moore* v. *Ogilvie*, 394 U.S. 814 (1969). But this Court has not erected a unique rule for election matters and has also frequently sustained mootness claims in such cases. *E.g.*, *Brockington* v. *Rhodes*, 396 U.S. 41 (1969); *Golden* v. *Zwickler*, 394 U.S. 103 (1969).

Furthermore, this is not a typical election case presenting questions about the constitutionality of nominating procedures or voter qualifications. This appeal implicates the constitutionality of a criminal statute. Its validity may therefore be reviewed not only on appeal from a civil case but also on appeal from a conviction. Clearly, such an appeal would not be mooted by passage of an election, and the issues presented by this case are, therefore, not likely to evade review, if they recur.

II. The Case Does Not Present A Substantial Federal Question.

Essentially[4] the Appellants base their appeal on the assertion that corporations enjoy First Amendment rights coextensive with those of natural persons or associations of

[4]The Appellants further argue that the challenged statute is vague, overbroad, and denies them equal protection of the law. Appellee chooses not to brief these issues and respectfully refers the Court to the discussion of these issues in the opinion of the Supreme Judicial Court (App. 15-23).

natural persons. The Appellee submits, and the Supreme Judicial Court held, that business corporations differ from natural persons and do not enjoy freedom of speech *per se*. Instead, a corporation's business and property interests are entitled to the protection of the Fourteenth Amendment, an incident of which is the possession of certain rights of speech and expression. "Thus . . . only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public" (App. 13).

It is undisputed that a corporation is neither a citizen of a state nor of the United States within the protection of the privileges and immunities clauses of Article IV, § 2, of the Constitution and the Fourteenth Amendment. *Asbury Hospital* v. *Cass County*, 326 U.S. 207, 210-211 (1945). It is equally clear that a corporation is "a 'person' within the meaning of the equal protection and due process of law clauses" of the Fourteenth Amendment. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 244 (1936). The question presented, then, is the extent of the protection those clauses afford corporate political expression.

Whenever corporations have successfully claimed First Amendment protection through the Fourteenth Amendment, a business or property, interest of the corporation has been directly involved.[5] This is true even in the recent cases cited by the Appellants, which invalidated state statutes restricting corporate expenditures or contributions relating to ballot questions. In *Pacific Gas and Electric Co.* v. *City*

[5] *E.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Grosjean* v. *American Press Co.*, *supra*.

of Berkeley, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976), a local ordinance prohibiting corporate political contributions was held to violate the First Amendment as applied to the plaintiff electric company, which was desirous of opposing a ballot question. The question would have authorized the city to acquire, by condemnation if necessary, plaintiff's facilities within the city. The court found: "The 'Acquisition Ordinance,' on which P G & E [Pacific Gas and Electric] sought to express its views, was not merely a matter of general interest to P G & E, but was expressly intended to result in the taking over of P G & E's facilities within the City of Berkeley." 131 Cal. Rptr. at 353. Obviously, such acquisition would have materially affected the business of Pacific Gas and Electric.

The United States District Court for the District of Montana held last year that a state statute placing an absolute bar on corporate political contributions was unconstitutional. *C & C Plywood Corp.* v. *Hanson*, 420 F. Supp. 1254 (1976). The action was brought by sixteen corporations and one bank who wanted to oppose an initiative amendment to further regulate nuclear facilities. The court noted:

> ". . . it appears that the only parties plaintiff with standing to sue in this case are: Montana Associated Utilities, Inc.; Montana-Dakota Utilities Co.; Montana Power Company; and, Pacific Power and Light.
>
> "I believe the action could be dismissed as to the other plaintiffs on the ground that they lack standing. The Nuclear Initiative primarily involves power, and it is the power companies that want to 'pay or contribute' on this matter." *Id.* at 1260.

The court did not rule that corporations do or do not have an absolute First Amendment free speech right, and appears instead to have ruled simply that those corporations with a material business interest in power must be permitted to protect that interest.

Neither Appellants, the Attorney General nor the court below have been able to find support for the proposition that a corporation's right to free speech is coextensive with that of natural persons. On the contrary, it seems clear that "a corporation does not have the same First Amendment rights to free speech as those of a natural person, but, whether its rights are designated 'liberty' rights or 'property' rights [footnote omitted] a corporation's property and business interests are entitled to Fourteenth Amendment protection. *Pierce* v. *Society of Sisters of Holy Names*, 268 U.S. 510 (1925)" (App. 12).

When a corporation has a direct, financial interest in the publication of views or the expression of ideas, a due process claim concededly attaches to any attempted governmental interference. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). Nor does communication lose its protection because money is expended for its publication and dissemination. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). When liberties protected by the Fourteenth Amendment are combined with corporate business or property interests, then the Constitution holds forth protection through the due process clause. As stated by this Court in *Pierce* v. *Society of Sisters of Holy Names, supra*:

> "Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. . . . But they have business and property for which they claim protection." (Citations omitted.) 268 U.S. at 535.

The Appellants in the case at bar failed to demonstrate that they were materially affected by the proposed graduated income tax amendment (App. 14-16). Accordingly, they may not successfully claim Fourteenth Amendment protection.

Appellants argue that not only are they entitled to speak, but that the public is entitled to hear their view. Nowhere in the record of this case is it indicated that the public has been deprived of the corporate position. Indeed, many individuals shared this perspective and were free to contribute and expend money in furtherance of their views. Thus, the limitations imposed on corporations by G.L. c. 55, § 8, "in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." *Buckley* v. *Valeo*, 424 U.S. 1, 29 (1976). Rather, those limitations serve the Commonwealth's legitimate interests in maintaining the integrity of elections and protecting minority shareholders from the political, as opposed to financial, judgment of the majority. Moreover, they do so without intruding on the constitutional prerogative of corporations to protect their business interests. Thus, the Supreme Judicial Court was clearly correct in ruling G.L. c. 55, § 8, valid and enforceable.

Conclusion.

Wherefore, Appellee respectfully submits that the questions upon which this case depends are so insubstantial as not to need further argument, and moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
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and
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APPELLANTS,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
APPELLEE.

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

BRIEF FOR APPELLANTS

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APPELLEE.

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

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BRIEF FOR APPELLANTS

Opinion Below

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at Mass. Adv.

Sh. (1977) 134, 359 N.E. 2d 1262, and is printed in the Appendix to the Jurisdictional Statement, pp. 1-24.

Jurisdiction

Appellants brought this action in the Single Justice session of the Supreme Judicial Court for the Commonwealth of Massachusetts seeking, *inter alia*, to have declared unconstitutional Massachusetts General Laws c. 55, §8 ("Section 8") on its face and as applied to plaintiffs insofar as it prohibited plaintiffs from expending or contributing any moneys to defeat a proposed constitutional amendment submitted to the voters at the general election on November 2, 1976. The complaint sought relief on the grounds that Section 8 violated the First and Fourteenth Amendments to the United States Constitution.

The case was reserved and reported by the Single Justice to the Full Court without decision. After argument, that Court issued a judgment on September 28, 1976, denying Appellants any relief and upholding Section 8. (Appendix to the Jurisdictional Statement, p. 27) The opinion of the Court entered February 1, 1977.

Appellants filed a timely notice of appeal with the clerk of the Supreme Judicial Court on September 29, 1976. (A. 2). The time for docketing this appeal was extended to February 25, 1977, on December 8, 1976.

The Jurisdiction of this Court is conferred by 28 U.S.C. §1257(2). *Commonwealth Bank* v. *Griffith*, 39 U.S. 55 (1840).

Constitutional and Statutory Provisions

There are numerous constitutional and statutory provisions referred to in this brief. They are listed in the Table of Contents and their texts are set out in Appendix "B" hereto. The case involves the constitutionality of Massachusetts General Laws c. 55, §8, which is set forth verbatim herewith:

No corporation carrying on the business of a bank, trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, ***no business corporation*** incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, ***shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of*** aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or ***influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.*** No person or persons, no political committee, and no person acting under the authority of a political committee, or in its behalf, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay, expend or contribute for any such purpose.

Any corporation violating any provision of this section shall be punished by a fine of not more than fifty thousand dollars and any officer, director or agent of

the corporation violating any provision thereof or authorizing such violation, or any person who violates or in any way knowingly aids or abets the violation of any provision thereof, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both. 6 Mass. Gen. Laws Ann. 71 (Supp. 1977-1978) (emphasis added).

Questions Presented

1. Whether the appeal is moot because the November 2, 1976, election has passed.

2. Whether Section 8, insofar as it forbids a business corporation from contributing or expending any moneys to communicate its views in opposition to a ballot question solely concerning taxation of individual income, absent a demonstration by the corporation that the proposed ballot question does, in fact, materially affect its business, property or assets, is invalid as a denial of freedom of speech.

3. Whether the words "materially affecting any of the property, business or assets of the corporation" as used in Section 8 are so vague as to deprive Appellants of their liberty or property without due process of law in violation of the Fourteenth Amendment.

4. Whether Section 8 denies Appellants equal protection of the law in that:

   a. it prohibits corporate expenditures, and thus corporate expression of views, pertaining to an individual income tax ballot question but does not prohibit corporate expenditures pertaining to other ballot questions, thus creating a classification based solely upon the content of the expression;
   b. it prohibits business corporations, but not labor unions, partnerships, business trusts or others similarly situated, from expending funds to oppose ballot questions solely concerning individual income taxes.

5. Whether the provision in Section 8, a criminal statute, that no question concerning solely the taxation of individuals "shall be deemed materially to affect" the business of a corporation is an improper presumption which deprives Appellants of liberty or property without due process of law.

Statement of the Case

Preliminary Notes:

The Order of the Supreme Judicial Court dated September 22, 1976, the judgment of the Supreme Judicial Court dated September 28, 1976, and the opinion of the Supreme Judicial Court dated February 1, 1977, are printed in the Appendix to Jurisdictional Statement and are not reproduced in the Appendix. Appellants will refer to the Appendix to Jurisdictional Statement herein as "(J.S. App.)."

The case of *First National Bank* v. *Attorney General*, 362 Mass. 570, 290 N.E. 2d 526 (1972), will be referred to herein as *FNB I*.

I. Procedural Background

Appellants are five business corporations (two banks, two scientific/technical concerns, and a business engaged in the development, manufacturing and sale of consumer products and services) who wished to expend moneys in opposition to a proposed state constitutional amendment submitted to the voters at the general election on November 2, 1976. The amendment, as it appeared on the ballot, proposed that the Legislature be granted the authority to

impose a graduated tax on individual income.[1] The defendant, Attorney General of the Commonwealth, indicated that he would prosecute Appellants pursuant to Section 8 should they expend funds to publicize their views on the proposed amendment to the public. (A. 9, 14). Appellants then sought declaratory relief in the Single Justice Session of the Massachusetts Supreme Judicial Court.

Appellants contended that Section 8 was unconstitutional on its face and as applied, and that it violated the First Amendment, the right to equal protection of the laws, and the due process clause of the Fourteenth Amendment. Similar contentions were raised under the Massachusetts Constitution.

The case was presented to the Single Justice on a Statement of Agreed Facts on April 26, 1976, and reserved and reported by him to the Full Bench without decision the same day. The case was argued before the Supreme Judicial Court on June 8, 1976. On September 22, 1976, the Court entered an order holding that Section 8 was not unconstitutional. (J.S. App. 25). No opinion was filed at that time. On September 28, 1976, a judgment was entered, without opinion, declaring that Section 8 was constitutional on its face and as applied. (J.S. App. 27). A notice of appeal was filed on September 29, 1976, and efforts to obtain a stay from the Supreme Judicial Court and from this Court thereafter were unavailing. On February 1, 1977, the opinion of the Supreme Judicial Court was entered.[2] This Court postponed a decision on jurisdiction on April 18, 1977, and ordered the parties to brief and argue mootness as well as the merits.

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[1] At present, the Massachusetts state constitution permits only flat-rate taxation upon individual income. Mass. Const., Amend. Art. 44.

[2] Because a judgment had been entered without an opinion Appellants had obtained an extension for the filing of the Jurisdictional Statement.

II. Factual Background

The general election of November 2, 1976, contained a ballot question asking whether the electorate would approve an amendment to the Constitution of the Commonwealth authorizing the General Court (the Legislature) to impose a graduated income tax on personal income. The proposed constitutional amendment was as follows (A. 10):

> ART. . As an alternative to levying a tax on incomes in the manner provided in Article XLIV of the Amendments to the Constitution, the General Court shall have full power and authority to levy a tax on personal incomes at rates which are graduated according to the total amount of income received, regardless of the sources from which it may be derived, and to grant reasonable exemptions, deductions, credits and abatements to such tax. Further, the General Court may define the tax liability or the total income upon which such tax is levied or the graduated rates at which it is taxed by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time and may prescribe reasonable exceptions to and modifications of such provision.

Massachusetts General Laws c. 55, §7 ("Section 7"), the so-called political contributions law, had for many years prior to June, 1972, provided that business corporations were prohibited from expending moneys for the purpose of influencing the vote on any question submitted to the voters other than one which materially affected the property, business, or assets of the corporation. In 1962 that provision was held not to prohibit corporate expenditures to oppose a graduated income tax referendum proposal. *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 183 N.E. 2d 871

(1962). By Chapter 458 of the Acts of 1972, effective June 20, 1972, the Legislature amended Section 7 by inserting, after the first sentence, the following (A. 7, 13):

> No question submitted to the voters concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

In an action brought by four of the present Appellants, *FNB I*, 362 Mass. 570, 290 N.E. 2d 526 (1972), two members of the Supreme Judicial Court held Section 7, as thus amended, to be unconstitutional and three members of that Court held that the statute did not prohibit plaintiff corporations from making expenditures for the purpose of affecting the vote on the 1972 ballot question concerning the adoption of a constitutional amendment which would allow the Legislature to impose a graduated income tax both on individuals and on corporations.

In June, 1972, plaintiffs The First National Bank of Boston ("First National"), New England Merchants National Bank ("Merchants"), Wyman-Gordon Company ("Wyman-Gordon") and The Gillette Company ("Gillette") each had contributed $3,000 to the Committee for Jobs and Government Economy, a duly organized political committee which raised and expended approximately $120,000 to oppose the proposed amendment. There was also a committee organized to promote passage of this constitutional amendment. The Statement of Agreed Facts submitted to the court below showed that this committee, Coalition for Tax Reform, Inc., raised and expended approximately $7,000 in this 1972 effort. Prior to argument before the Supreme Judicial Court two organizations[3] were

[3] The intervenors were the Coalition for Tax Reform, Inc., itself, and United Peoples, Inc. They have withdrawn from the case and are not parties to this appeal.

allowed to intervene herein as parties defendant. These intervening defendants appended to their brief documentation tending to show that the total expended by that committee to promote the graduated tax in 1972 was closer to $15,000, a 100% error. These documents were thus before the Supreme Judicial Court and the parties have, by agreement, reproduced them in the Appendix. (A. 32-36).

The amendment was rejected by the voters by a vote of 1,455,639 to 712,030 in 1972. (A. 25).

Following the decision in *FNB I*, the Legislature, by Chapter 348 of the Acts of 1973, added the word "solely" to Section 7 so that it read:

> No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

Subsequently, by Chapter 1173, §4B of the Acts of 1973, the maximum imprisonment penalty and fine for individuals in violation of this Section was increased from six months to one year, and from $5,000 to $10,000 respectively. By Chapter 859, §6 of the Acts of 1974, the Legislature increased the penalty upon corporations for violations of Section 7 to a maximum of $50,000.

By Chapter 151 of the Acts of 1975, effective April 28, 1975, the General Court amended the General Laws by striking out Chapter 55 and inserting in its place a new Chapter 55. The substantive provisions of what was Section 7 are now Section 8. Section 8 is set forth in its entirety, *supra*, at 3-4.

Each of the Appellants intended to expend moneys for paid advertisements in newspapers and other media in an effort to persuade the voters to vote against the proposed 1976 constitutional amendment. (A. 22). The plaintiffs

below contended that Section 8 is unconstitutional on its face and as applied to them. They asserted, and the Attorney General denied, that, being corporations, they cannot communicate their contentions without expending some moneys. (A. 7, 13). Appellants contended that the proposed constitutional amendment would allow a direct new tax to be imposed on personal incomes, and such a tax would materially affect corporate interests. The Appellee agreed that this is the position of the Appellants' management but denied that the corporations' interests would be affected by the proposed constitutional amendment or the imposition of the graduated income tax itself inasmuch as there is a division of opinion among economists as to whether and to what extent such a tax would affect the business and assets of corporations. (A. 17). The agreed facts indicate each of the Appellants' ties to the local economy as follows:

Appellant Banks maintain their headquarters in Suffolk County and engage in the usual business activities attendant upon conducting a commercial banking enterprise. (A. 15). First National has approximately 126,000 individual checking accounts with an approximate balance of $146,000,000. (A. 18). In addition, First National has approximately 137,000 individual savings accounts with a balance of $206,000,000. (A. 18). It is the position of the management of First National that a graduated income tax on individuals would affect its business and property by tending to reduce these individual balances. (A. 18). First National has approximately 209,000 individual loans outstanding with a balance of $227,139,000; it is the position of its management that a graduated income tax would tend to work an adverse effect on the total of these loans. (A. 18).

Merchants has similar individual loans and deposit accounts, in each category its numbers and balances being somewhat less than First National, which is the largest

bank in the area. Merchants' totals in these categories are in the multi-million dollar range, and the management of Merchants shares the view that a graduated income tax would have an adverse effect on these balances. (A. 18).

It is the position of the management of both Banks that a graduated income tax would discourage businesses from settling or remaining in Massachusetts, with a resultant adverse effect on the Banks' industrial loans, deposits and other services. (A. 19). The Banks' interest in the prosperity of the business community is indicated in the following statistics: First National has approximately 6,000 industrial and corporate loans outstanding with a balance of $1,872,000,000; Merchants' balance for similar loans is $569,300,000. (A. 19). First National has approximately 29,000 industrial and commercial deposit accounts with a balance of $897,000,000; Merchants has 14,000 such deposit accounts totalling $358,889,000. (A. 19).

Appellant Banks have no branch offices in any other state, or in any Massachusetts county other than Suffolk. (A. 19).

It is the position of management of Appellant Banks that a graduated income tax imposed on individuals would discourage people of high ranking executive and middle management ability (and thus of high salary potential) from settling or remaining in Massachusetts, with a resultant adverse effect on the Banks' ability to retain such personnel. The Banks, between them, employ over 700 persons whose salaries are $20,000 or more, with the top salaries well in excess of $100,000. (A. 17-18).

Wyman-Gordon's position with respect to how a graduated income tax would affect its business and property is similar to those of the other Appellants. It is a Massachusetts corporation maintaining plants in three communities. It employs 1700 people with an annual payroll of approximately $27,000,000. (A. 20). It presently has 206 em-

ployees earning $20,000 or more. (A. 20). These include executives as well as highly paid technical personnel which are necessary in Wyman-Gordon's business; it is engaged in the business of die forging, utilizing highly sophisticated metal forming techniques. Wyman-Gordon principally serves the aircraft and turbine engine industries. (A. 16).

It is the position of the management of Wyman-Gordon that a graduated income tax would affect its business and property, among other ways, by discouraging executives and engineering and technical specialists from settling or remaining in Massachusetts. (A. 19-20).

It is similarly the position of the management of Gillette that the graduated income tax would adversely affect its business and property by discouraging persons of high ranking executive and middle management ability from settling or remaining in Massachusetts. (A. 20). Gillette is a business corporation with plants in South Boston and Andover, Massachusetts, where it employs approximately 6,000 persons, 857 of whom earn $20,000 or more. (A. 20-21). Gillette's net sales of consumer products in Massachusetts in 1974 were approximately $39,600,000. (A. 21). It believes the graduated income tax might shrink disposable income available for such purposes. (A. 20). Gillette owns tangible property worth $30,000,000 and leasehold improvements worth $1,500,000. (A. 21).

Digital Equipment Corporation ("Digital") is a Massachusetts corporation engaged in the design, manufacture, sales and servicing of computers, and other systems using digital techniques, employing approximately 11,500 persons in 12 Massachusetts locations. (A. 21). It operates in a highly competitive market and it is the position of the management of Digital that a graduated income tax would adversely affect its business and property in that it would impair Digital's ability to attract executive, technical and other skilled professional people to Massachusetts, and

the number of Massachusetts-based employees wishing to relocate to Digital facilities in New Hampshire, Arizona, and elsewhere would increase. (A. 21). Digital presently has 1,207 employees earning $20,000 or more. (A. 21-22).

The boards of directors of all of the Appellants have been notified of the commencement of this action, and three have formally ratified the action. (A. 26).

Forty-one states, including Massachusetts and the District of Columbia, impose income taxes on personal income. Fourteen states, including Massachusetts, do not have graduated income taxes. (A. 26).

Appellants attack Section 8 on equal protection grounds as well as First Amendment and due process grounds. Appellants will argue herein that the statute does not purport to preclude similar expenditures of funds on behalf of trusts, unincorporated associations, charitable corporations, trade unions, partnerships or other forms of business organizations. There are at least 7,500 active Massachusetts business trusts in operation in Massachusetts. (A. 24). The asset and income statistics for 20 of these trusts are set forth at p. 30 of the Appendix; these trusts have total assets of approximately $5,458,901,000 and a gross annual income in excess of $402,829,000. (A. 24). No statistical information with respect to the other 7,480 business trusts is available. (A. 24).

There are also 15,000 partnerships in Massachusetts which earned a total of $1,816,000,000 in business receipts during the year 1972, the last year for which cumulative statistics are available. (A. 24).

There are 2,250 local labor organizations in the State with a membership of 590,625. (A. 24).

Appellants sought a declaration that the statutory prohibition is unconstitutional on its face and as applied to them. Alternatively, Appellants urged the Court to construe narrowly the "materially affecting" proviso so as

to allow expenditures by corporations whose management reasonably believed their business to be materially affected and, as thus construed, to hold that Appellants could expend the desired funds. The court below denied all of plaintiffs' arguments and declared Section 8 constitutional on its face and as applied.

On November 2, 1976, the proposed constitutional amendment was defeated at the polls. (J.S. App. 3 n.6).

The record contains the names and addresses of contributors to the 1972 committee proposing and opposing the graduated tax.[4] There were substantial corporate contributors, but partnerships, unions, charitable corporations and others also contributed. Furthermore, the list of contributors to the committee in favor of the tax would seem to have omitted over 50% of the total. (A. 31-35).

Summary of Argument

I

The action is not moot because it falls into the class of cases "capable of repetition, yet evading review" which, if not heard after the specific dispute has terminated, will never be able to be reviewed. The Legislature has on four separate occasions proposed to the people that the Constitution be amended to allow a graduated income tax. Each time the Legislature votes overwhelmingly in its favor; each time the people vote it down. Accompanying these efforts are the Legislature's repeated efforts to come up with a statute which will effectively keep corporate money out of the referendum campaign on this point. The Massachusetts court's decision approves the exclusionary statute. It is thus a virtual certainty that there will be future graduated tax proposals and that the currently effective

[4] This list of names, being quite bulky, was not reproduced in the Appendix. (A. 31).

statutory barrier to corporate speech will remain an obstacle. These Appellants oppose the tax and will remain opposed; they would speak against it if they could.

Experience shows there will be, at most, a period of 18 months prior to the election within which a declaratory judgment may be pursued. This is in part because the procedure for getting questions on the ballot is very time consuming. Given huge court backlogs and the time required for the normal progression of a case to the level of the Supreme Court, there will never be time to obtain review by this Court early enough to allow Appellants, if successful, to expend moneys for communications in advance of the election. (pp. 18 to 25).

II

Section 8 has been interpreted by the court below as having created two distinct crimes: expending funds for communications to the public as to a ballot question which does not materially affect the corporation and expending funds for communications to the public as to a ballot question which solely concerns individual taxes, regardless of materiality. The Court held, however, that any corporation which proved that a particular ballot question did materially affect its assets could claim First Amendment protection for its speech pertaining to that question. Presumably such a corporation would be free from "both" crimes embodied in Section 8.

Thus limiting First Amendment protection to speech concerning matters proven to be material to the corporate speaker constitutes a prior restraint. This is especially so when the particular ballot question concerns a constitutional amendment pertaining to individual taxes and what the effect upon corporations might be should the amendment pass is a subject upon which economists differ.

Business corporations do have rights of freedom of expression; the message which Appellants wish to convey concerns basic economic and political policies and the public has a First Amendment right to hear it; neither precedent nor logic supports the proposition that such corporate expression of ideas may be forbidden by the criminal law unless the particular message is proven to be of material concern to the speaker. The law serves no compelling or even tolerable state purpose, and as a broad, total prohibition of expenditures or contributions, it is not the least restrictive means to carry out whatever policy might be served. The statute chills expression of basic ideas. Such a law cannot be tolerated under the First Amendment.

At the least, corporate communications ought to be protected where management reasonably believes the corporate interests to be materially affected. (pp. 25 to 60).

III

Due process principles invalidate any criminal statute which forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application. Particular clarity and specificity are required in criminal statutes which restrict expression. The standard in Section 8, whether or not a particular referendum question materially affects a corporation's business, is unconstitutionally vague especially when applied to a ballot question such as is involved in this case. Whether and to what extent a constitutional amendment allowing but not requiring graduated rates on individual income taxes would affect a particular corporation is completely speculative and economists differ among themselves. Although it is a question about which strong opinions are held, it is essentially unprovable one way or the other, dependent as it is upon such factors as what rates might be imposed by future legislatures if graduated rates were to become available. (pp. 60 to 66).

IV

Section 8 violates Appellants' rights to equal protection of the laws in two ways. First, it purports to prohibit corporate expenditures, and thus corporate expression, as to ballot questions solely pertaining to individual taxation but it does not purport even to limit corporate expenditures as to other ballot questions, so long as they materially affect the corporation. This amounts to a classification based upon the content of the expression. Second, it imposes heavy criminal restrictions upon corporations but does not purport to regulate in any way other organizations similarly situated, such as labor unions, trusts, charitable corporations, partnerships and the like.

With respect to each of these classifications strict scrutiny is required because fundamental rights are affected. The court below applied only the rational interest test. No compelling state interest was found, and none exists. The statute is not the least restrictive alternative assuming a compelling purpose was found.

As to the statute's failure to include within its scope unions and other entities similarly situated, there is not even a rational state interest served. A purpose to protect shareholders from *ultra vires* expenditures is not served by a prohibition as to public communications concerning a proposed graduated tax constitutional amendment but not prohibiting communications concerning legislation enacting a graduated tax once the amendment is adopted. Furthermore, some of the unregulated entities have shareholders; their plight concerning *ultra vires* expenditures is ignored, as is the plight of corporate shareholders as to ballot questions other than those solely relating to individual tax questions.

Any state policy to preclude "undue influence" by corporations over the electorate because of greater resources is irrational and constitutionally impermissible under *Buckley* v. *Valeo*, 424 U.S. 1 (1976). (pp. 67 to 82).

V

Many decisions of this Court invalidate on due process grounds the use of legislatively created irrational presumptions in criminal cases. The proviso in Section 8, that questions solely pertaining to individual taxes shall not be deemed materially to affect a corporation's business, takes the form of a presumption, and it is not a rational one. The Massachusetts court ruled that the proviso was not a presumption but, rather, created a separate new crime. The practical effect, however, is the same. Under the Court's analysis a corporation must affirmatively prove that a particular ballot question materially affects its business in order to be able to spend money to publicize its views. This means, at best, that what is phrased as an irrebuttable presumption in the statute now has the practical effect of a rebuttable presumption. Whether one looks to the actual language of the proviso itself, then, or whether one looks to the practical result of the Court's opinion, the principles underlying this Court's decisions invalidating the use of irrational rebuttable presumptions in criminal cases are applicable here. They mandate reversal. (pp. 82-86).

Argument

I. The Action Is Not Moot

The event precipitating Appellants' request for relief—the placement of a proposed constitutional amendment on the November, 1976, ballot—has ended. Nevertheless, under the standards articulated by this Court, the appeal is not moot.

The appeal falls within that class of cases "capable of repetition, yet evading review" which, if not heard after

the specific underlying dispute has terminated, will never be able to be reviewed by this Court. *Southern Pacific Terminal* v. *ICC*, 219 U.S. 498, 515 (1911). In *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam), the Court set forth, as follows, the two elements which, if found in a case other than a class action, will satisfy the "capable of repetition, yet evading review" doctrine: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." The instant case satisfies both elements.

A. *The Same Controversy Will Recur*

Section 8 imposes an outright ban on all corporate expenditures for the purpose of influencing the vote on questions solely concerning individual taxation. The Supreme Judicial Court has ruled that the provision would be invalid only if a corporation has proven that a proposed individual income tax question does in fact materially affect its business. (J.S. App. 14). The Court specifically noted that "reasonable belief" that a proposed question would materially affect a corporation is not sufficient. (J.S. App. 15 n.15). Thus, when Appellants renew their challenge to the statutory prohibition before the next election, it necessarily will entail litigation.

The 1976 election marked the fourth time in recent years that a proposed graduated income tax amendment has been submitted to the Massachusetts voters by ballot question. The Massachusetts Constitution requires that any proposed constitutional amendment pass both houses of the Legislature in two consecutive sessions before appearing on the ballot. Mass. Const., Amend. Art. 48, IV §§4, 5. This procedure was followed in the 1962, 1966, 1972 and 1976

elections.[5] Each time the voters rejected the proposal, but as note five indicates, the Legislature continues by lopsided margins, to place the issue on the ballot. Moreover, several politically influential groups have advocated in the past and undoubtedly will continue to press for passage of a graduated income tax. In fact, a bill now is pending in the Legislature to enact a graduated income tax, and a copy has been filed as Appendix G to Appellants' Jurisdictional Statement. (J.S. App. 49). It would

[5] In a joint session of the two branches held on May 13, 1959, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1962 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 143 affirmative votes and 118 negative votes. Journal of the Senate 848-51 (1959). It was approved a second time by the Legislature on March 29, 1961, when the proposed amendment received 144 affirmative votes and 121 negative votes. Journal of the Senate 717-20 (1961).

In a joint session of the two branches held on August 30, 1966, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1968 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 188 affirmative votes and 46 negative votes. Journal of the Senate 1678-81 (1966). It was approved a second time by the Legislature on May 10, 1967, when the proposed amendment received 174 affirmative votes and 78 negative votes. Journal of the Senate 1121-23 (1967).

In a joint session of the two branches held on July 2, 1969, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1972 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 204 affirmative votes and 49 negative votes. I Journal of the Senate 1586-90 (1969). It was approved a second time by the Legislature on May 12, 1971, when the proposed amendment received 245 affirmative votes and 20 negative votes. I Journal of the Senate 1290-94 (1971).

In a joint session of the two branches held on August 15, 1973, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1976 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 199 affirmative votes and 66 negative votes. II Journal of the Senate 2126-29 (1973). It was approved a second time by the Legislature on May 7, 1975, when the proposed amendment received 228 affirmative votes and 41 negative votes. I Journal of the Senate 1409-12 (1975).

take effect upon approval by the voters of a constitutional amendment.

Section 8 imposes a continuing statutory obstacle to spending moneys in opposition to a graduated income tax ballot question.[6] The Attorney General, whether the present incumbent or a successor, will enforce the statute. State policy "is not contingent upon executive discretion." *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 124 (1974). Unlike the situation in *Spomer* v. *Littleton*, 414 U.S. 514 (1974), Appellants are not challenging the behavior of a particular state's attorney. Even in cases, unlike the present one, where there is no statute which effectively precludes discretion, this Court has been willing to assume that the appropriate authorities would apply the law. *E.g.*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976) (case law authorizing prosecutors to seek restrictive orders meant such orders would be sought and thus case not moot).

Finally, there is a reasonable likelihood that the same complaining parties again will be subjected to the same statutory prohibition. All the complaining parties believe that a graduated individual income tax would materially affect their business and all wished to spend funds to oppose the constitutional amendment in 1976. The very fact that they are seeking plenary review before this Court

[6] Corporate expenditures and contributions for political matters have been prohibited or restricted since 1907. St. 1907 c. 576, §22. In 1938 corporations were allowed to spend moneys as to a ballot question "affecting" the corporate property, business or assets, St. 1938, c. 75, and in 1943 this was revised to require that the question "materially affect" the same. St. 1943 c. 273, §1. *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 652, 183 N.E.2d 871 (1962). This provision compels a demonstration by the corporation of materiality in fact according to the court below. (J.S. App. 11-15). The tailor-made prohibition against graduated income tax expenditures dates from 1972 (J.S. App. 6) and now provides that no ballot question solely concerning individual taxation shall be deemed to have such a material effect.

after the election has passed indicates their continuing purpose to secure the right to expend funds in future elections. Moreover, the record indicates that four of the five Appellants contributed funds in 1972 in opposition to the proposed graduated income tax constitutional amendment which appeared on the 1972 ballot. (A. 19, 20, 21). It may be inferred that they contributed in earlier graduated income tax campaigns. *See Lustwerk* v. *Lytron, Inc.,* 344 Mass. 647, 183 N.E. 2d 871 (1962). Unlike the situations presented in *Weinstein* v. *Bradford, supra,* 423 U.S. at 149 (highly improbable that released convict would once again acquire status of parolee), or *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974) (virtually impossible that final term law school student would once again acquire status of law school applicant), in the instant case there is more than a reasonable probability that the same complaining parties will again believe themselves to be unconstitutionally restricted by Section 8.[7]

B. *The Time Frame Will Preclude Review*

Appellants, in order to avoid "ripeness" problems, may not bring a new action until it is clear that a graduated income tax constitutional amendment will appear on the ballot. *California Bankers Ass'n.* v. *Shultz,* 416 U.S. 21, 72-75 (1974); *O'Shea* v. *Littleton,* 414 U.S. 488, 495-98 (1974). Passage twice through both houses of the Legislature is time-consuming, and experience indicates that the process will not be completed until approximately 18 months prior to the next election. *See* note five, *supra.*

[7] In the meantime, the offending statute remains on the books, fully enforceable, and works a profoundly chilling effect upon the expression of ideas as to important public issues. Witness the letter recently received by one of the Appellants, Wyman-Gordon Company, a copy of which is appended hereto as Appendix A, concerning Wyman-Gordon's contribution to support a local referendum proposal concerning a civic center for the City of Worcester.

In 1976 Appellants presented their case by means of a statement of agreed facts. The opinion below held that the absence of a finding that these corporations would, in fact, be materially affected by the ballot question was fatal to Appellants' constitutional contentions. Since the Attorney General obviously will not stipulate to this material effect (having prevailed in this case on precisely that point), Appellants will be faced with proving the material effect at trial. The trial and review process cannot be completed within 18 months.[8]

After a trial on the merits, and the issuance of a written decision, these Appellants would face review by the Massachusetts Appeals Court and then the Supreme Judicial Court before an appeal could be taken to this Court. Appellants could under no foreseeable circumstances obtain plenary review before this Court in sufficient time to be able to expend funds in a meaningful fashion in advance of the vote. *E.g., Roe* v. *Wade,* 410 U.S. 113 (1973).[9]

Of course, Appellants' contention on the present appeal is that the imposition of such a burdensome course on the

[8] In Suffolk County, where the instant case originated, the average time from date of entry to trial in Superior Court is 56 months; the average time in all other counties is 43 months. 19 Annual Report to the Justices of the Supreme Judicial Court 64 (June 30, 1975).

The instant case was commenced in the Single Justice session of the Supreme Judicial Court. This process is quite compatible with a relatively expeditious handling of a case upon an agreed statement. Where the prospect is for a hotly contested trial, presumably consuming days or weeks with the testimony of economic experts on whether and to what extent future individual tax rates may impact on corporate business, the case will be processed through the Superior Court, the trial court of the Commonwealth.

[9] The opinion of the court below indicated that 18 months might have been enough to accomplish a trial on the merits. (J.S. App. 15 n.15). This was in the context of its commentary upon the fact that suit was commenced in 1976 rather than sometime in 1975. The court does not intimate, of course, that a full trial, review by the Supreme Judicial Court, and further review by this Court could be accomplished in that time frame.

exercise of the right to express an economic and political viewpoint is unconstitutional. That issue is presented on the present record. If it is not resolved by this Court now, it will never be resolved.

C. *Election Cases*

This Court, applying the *Southern Pacific Terminal* "capable of repetition, yet evading review" standard, has repeatedly sustained its jurisdiction in election cases although the specific election underlying the action has passed. *E.g., American Party* v. *White,* 415 U.S. 767, 770 n.1 (1974); *Rosario* v. *Rockefeller,* 410 U.S. 752, 756 n.5 (1973); *Dunn* v. *Blumstein,* 405 U.S. 330, 333 n.2 (1972); *Moore* v. *Ogilvie,* 394 U.S. 814, 816 (1969).[10] "In these cases [individual challenges to state election laws after the elections had taken place] the Court recognized the importance of the issues to candidates and voters who would participate in future elections and accepted jurisdiction under the *Southern Pacific* rationale without reference to the absence of a formal class action." Note, *The Mootness Doctrine In The Supreme Court,* 88 Harv. L. Rev. 373, 388 (1974).

Guidance on the resolution of the mootness question posed by the instant case may be found in this Court's discussion in *Storer* v. *Brown,* 415 U.S. 724, 737 n.8 (1974) (challenge to state election laws relating to placement of independent candidates on the California ballot):

[10] In those election cases in which mootness claims have been sustained, factors other than the mere passing of the election were determinative. *Brockington* v. *Rhodes,* 396 U.S. 41, 43 (1969) ("limited nature of the relief [mandamus] sought"); *Hall* v. *Beals,* 396 U.S. 45 (1969) (intervening change in state law); *Golden* v. *Zwickler,* 394 U.S. 103 (1969) (Congressman, target of anonymous handbills, elected to bench).

> The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is "capable of repetition, yet evading review." [Citations omitted.] The "capable of repetition, yet evading review" doctrine, in the context of election cases, is appropriate when there are "as applied" challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

Appellants submit that under the principles articulated in *Storer,* this action is not moot.

II. The Section 8 Prohibition Is Unconstitutional As A Violation of Freedom of Expression

A. *Introductory Comments*

There is a certain degree of inconsistency in the opinion of the Supreme Judicial Court. As a preliminary matter, Appellants will touch on this point and suggest an interpretation of the opinion which will minimize the constitutional problems inherent therein and present, more simply, what constitutional issues remain.

Plaintiffs below claimed a constitutional right, based on the facts in the case, to expend and contribute moneys to communicate their views to the public on the graduated

income tax referendum question. Appellants attacked c. 55, §8 under the First Amendment. Appellants claimed that the statutory standard as to what communications are forbidden (those concerning questions which do not "materially affect" the corporation) coupled with the statutory proviso or presumption (that questions solely pertaining to individual taxation shall not be deemed materially to affect the corporation) amounted to a statutory prohibition in violation of the First Amendment.

The Massachusetts court held, as a matter of federal constitutional law, that corporations such as Appellants do have First Amendment rights, but that the extent of those rights is limited to communicating as to matters which materially affect the corporation.

> Thus, we hold today that only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public.
>
> (J.S. App. 13)

The Court held that if Appellants had proven, as a fact, that the particular referendum question would have a material effect on the corporations, the proviso to the contrary would be "invalid" as to Appellants and would not prohibit the communications Appellants wished to make here. (J.S. App. 11-15). It bears emphasis that this is a full-fledged constitutional holding of the Supreme Judicial Court.

Appellants had also attacked the said proviso (deeming questions pertaining solely to individual taxes to be nonmaterial) under the due process clause of the Fourteenth Amendment. Appellants claimed that the statutory proviso

constituted an irrebuttable presumption whereby the Legislature had, indirectly and improperly, supplied for the jury one of the elements of the crime it had previously created. *See, e.g., Tot* v. *United States,* 319 U.S. 463 (1943). The element thus supplied, Appellants argued, was the ballot question's lack of materiality to the corporate business or assets which was, otherwise, one of the elements the prosecutor would have to prove in order to convict under c. 55, §8. The Court, in denying this claim, ruled that the proviso, despite its form, had not in fact created a presumption as to nonmateriality. Rather, it had created an entirely new crime: the crime of expending corporate funds to express views pertaining to a ballot question solely related to individual taxes. Materiality, or its lack, is not pertinent to this second crime. The Court is explicit in this regard:

> Although §8 as amended may be inelegantly written, it requires the prosecution to prove that: (1) the defendant is a corporation; (2) the defendant corporation made an expenditure; (3) the purpose of the expenditure was to influence or affect the vote; and (4) that the vote was on a question solely relating to the taxation of the income, property, or transactions of individuals.
>
> (J.S. App. 23-24)

Thus the Court, having already held under the First Amendment that corporate communications may only be prohibited concerning those political questions which are nonmaterial to the corporate interests, then went on to "save" a criminal statute by meticulously construing it as forbidding communications concerning a particular kind of question regardless of whether or not the question is material to the corporate interests.[11]

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[11] It is clear, of course, that both of these crimes found by the court to inhere in Section 8 constitute roadblocks to Appellants' proposed communications.

Appellants assume herein that the consistent thread running through the Court's analysis is that the First Amendment provides protection for corporate speech concerning any ballot question if the corporation proves that the question is one which materially affects its business. It is assumed in this brief that the opinion of the Massachusetts court would recognize that if the referendum question at issue here is one which would materially affect the Appellant corporations, they may expend and contribute funds to publicize their views without threat from *either* of the two statutorily created crimes. The statute as thus construed is, Appellants argue, still deficient. If, contrary to this assumption, however, the Massachusetts court's opinion really construes the statute as properly forbidding corporate expenditures even with respect to questions materially affecting corporations, as long as the questions happen to pertain solely to individual taxation, then the statute is even more basically flawed.

B. *The Court's First Amendment Holding and Its Constitutional Infirmities Summarized*

With respect to Appellants' First Amendment argument, the Supreme Judicial Court held as follows:

1. Corporations do have First Amendment rights.
2. Only when a general political issue materially affects a corporation's business, property, or assets, may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public.
3. To take advantage of this constitutional protection a corporation must affirmatively demonstrate that its material interests are in fact affected. A reasonable belief by management that its interests are materially affected will not suffice.
4. Absent such an affirmative showing, a state criminal statute may effectively and properly prohibit expenditures or contributions, in any amount, for purposes of publicizing the corporation's views.
5. Absent a demonstration of materiality in fact: a compelling state interest need not be found for the statute; strict scrutiny need not be applied; the criminal sanctions imposed need not be the least restrictive alternatives available.

The flaws in the foregoing are the following:

1. The statute, as thus construed, imposes a prior restraint on the expression of political and economic views and brings about an impermissible chilling effect.
2. The opinion ignores the right of the public to hear regardless of whether or not the matter discussed materially affects the speaker.
3. Any statute whose purpose and result is to limit freedom of expression must serve a compelling state interest and survive strict scrutiny. No such analysis was given by the court below. The statute cannot survive such an analysis if made.
4. Such a statute must fail if there are less restrictive alternatives available to serve the state's interest. The court below applied no such test. The statute cannot survive such a test.

C. *Chilling Effect and Prior Restraint*

The portion of the opinion holding that the Legislature created a separate and distinct criminal stricture purporting to forbid corporations from expending moneys to publi-

cize their views with respect to any ballot question solely relating to individual taxation is consistent with the position of the Appellants, as argued below, that the proviso at question here is an absolute prohibition against such expenditures regardless of whether or not an individual income tax question might materially affect a corporation. Appellants contend that the manner in which the prohibition is promulgated is by an impermissible presumption; the court below disagreed and held that the proviso was a separate and distinct prohibition and created a separate crime. The Court did agree with Appellants' contention, however, that the prohibition is absolute and not dependent upon whether or not the proposed tax would materially affect the corporation.[12] (J.S. App. 23-24).

This is attested by the history pertaining to the graduated income tax effort in Massachusetts, which indicates quite clearly the persistent and overriding desire of the Legislature to prohibit, once and for all, the influx of corporate money which the Legislature had seen as thwarting its efforts to achieve a more enlightened tax vehicle. As has been shown above (p. 20 n.5) the Massachusetts Legislature has for many years desired to enact a graduated income tax. Prior to the 1976 ballot proposal the Legislature had three times proposed a constitutional amendment by substantial if not lopsided margins. Each time the voters turned down the proposal by substantial if not lopsided margins. *Id.*

Contributing to the frustration of the Legislature was the fact that corporations had been held entitled to spend moneys to publicize their views. It would appear obvious that the Legislature believed that those views were in opposition to the proposed tax amendment. *See Lustwerk* v.

[12] The Court reintroduced the concept of the material effect as a constitutional prerequisite for corporate freedom of expression. (J.S. App. 13).

Lytron, Inc., 344 Mass. 647, 183 N.E.2d 871 (1962); *FNB I*, 362 Mass. 570, 578, 290 N.E.2d 526 (1972); and pp. 7 to 9, *supra*. Following *FNB I*, the Legislature amended the statutory proviso to forbid corporate expenditures as to ballot questions pertaining "solely" to individual taxes, and the 1976 proposed constitutional amendment presented by the Legislature to the voters did pertain solely to individual taxes. Meanwhile, criminal penalties increased until, by 1976, $50,000 fines and jail sentences up to one year were authorized. *See* p. 9, *supra*. The purpose of the statute is complete exclusion of corporate funding and the crime created faithfully (and, to date, successfully) carries out the purpose.[13]

The chilling effect which has attended the Legislature's successful and dogged opposition to corporate expression is obvious. The underlying statutory standard—that of a ballot question which materially affects a corporation—is so uncertain, particularly when viewed in the context of a proposed constitutional amendment which would allow but not require a graduated income tax on individuals, as to render foolhardly any corporate management which would authorize corporate expenditures in this area without a court ruling as to materiality. Clearly no corporate expenditures would have been made in previous referendum campaigns without the *Lustwerk* and *FNB I* decisions. The vagueness of the statute is addressed in detail below (pp. 60-66). It must be remembered that *any* corporate contribution or expenditure, no matter how small, to publicize the corporate viewpoint on the ballot question, risks the heavy penalties of the statute if management's view as to the materiality of the question to its business is not accepted by a criminal jury. The expenditure of $2.00 by

[13] It is ironic that the 1976 graduated tax proposal fared no better than its predecessors despite the absence of corporate contributions or expenditures. *See* J.S. App. 3 n.6.

an incorporated corner drug store to make a sign to hang in the window urging passersby not to vote for a graduated income tax referendum question would subject the proprietor to a one-year jail sentence if a criminal jury did not believe that the graduated individual income tax would, in fact, materially affect the drug store's business. This is true under the "materially affect" standard itself.

The proviso which introduced the presumption of non-materiality as to questions pertaining solely to individual taxes reinforced the chill that the "materially affect" standard itself had brought about. Although the opinion below has held that corporations may free themselves of this proviso if they prove that the graduated tax referendum would, in fact, materially affect them (*see* J. S. App. 12-15), this merely reintroduces in constitutional form the same doubts and ambiguities which attended the phrase when it was merely a statutory concept. While courts have often molded statutes to align with constitutional principles, the Massachusetts court has reversed the process and shaped the Federal Constitution after a very troublesome and uncertain Massachusetts statute. (J.S. App. 13). It is bad as a statutory standard. As a First Amendment standard it is untenable.[14]

The options left to a corporation under the Supreme Judicial Court's ruling are to remain silent, to incur the expense and burden of prevailing in a civil declaratory judgment wherein the corporation must prove as a fact that an amendment to the Constitution allowing for graduated rates on individual taxes would materially affect the corporation, or to defend a criminal complaint based upon the same contention.[15] Silence would probably be deemed the best course by all but the wealthiest and bravest.

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[14] In an antitrust or deceptive business practice statute a somewhat imprecise standard may chill predatory tactics. The chilling of protected expression is quite another matter.

[15] The Attorney General will prosecute. (A. 9, 14).

The procedures followed in the instant case, wherein Appellants sought by means of a statement of agreed facts to raise the issue for a relatively speedy and simple resolution by the court, is obviously not available as a realistic option. Since the right to speak, under the lower court's decision, is dependent upon a factual finding of materiality, and since the Attorney General will clearly not stipulate to such a fact, the question must be determined by a jury after trial. A reasonable belief by the corporation that its material interests are at stake is not enough. (J.S. App. 15 n.15). The record states the obvious: experts disagree as to whether and to what extent a graduated individual tax would affect corporations. (A.17). A corporation, assuming the affirmative burden of establishing what the effect will be and persuading the jury that that effect will be "material" faces an enormous task. Experts must be retained to grapple with, among others, the following issues: if graduated rates are constitutionally allowed, at what level might the Legislature set those rates? what rate increases might be expected in the future? how important are income tax rates in the choice, by middle and upper management personnel and skilled technical people, of where to locate? how important are such people to the particular corporation? does the particular corporation compete with corporations from other states as an employer? which other states? how is the tax climate perceived in those states? Each of the factors set forth in the facts (A. 16 to 22) as indicating a tie between corporations such as these Appellants and the economic and tax climate in Massachusetts would be examined (among others), and experts would sagely opine as to the significance, or lack of significance, of such factors.

The expense and aggravation of such a proceeding constitutes an undue burden upon First Amendment rights. "[E]ven when pursuing a legitimate interest, a State may

not choose means that unnecessarily restrict constitutionally protected liberty." *Kusper* v. *Pontikes*, 414 U.S. 51, 58-59 (1973). "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." *Lamont* v. *Postmaster General*, 381 U.S. 301, 309 (1965) (Brennan, J., concurring) (Requirement that an addressee notify the Post Office of his desire to receive mail unconstitutional because almost certain to have a deterrent effect). *See also Cantwell* v. *Connecticut*, 310 U.S. 296, 307 (1940) (Statute prohibiting solicitation for religious or charitable purpose absent determination by secretary of public welfare that cause is religious or charitable constitutes an unconstitutional restraint, "a forbidden burden upon the exercise of liberty protected by the Constitution") and *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

The requirement of a demonstration of factual materiality constitutes a prior restraint upon the expression of ideas and should not be tolerated.

D. *The Holding of the Court Limiting Corporations' First Amendment Rights to Questions Materially Affecting the Corporations Is Error*

In the previous section of this brief Appellants have argued that the combination of the vague standard of materiality, the difficulty of assessing materiality as it pertains to a question such as a proposed graduated income tax, and the Massachusetts court's requirement that corporations earn their right to speak by factually proving such materiality amounts to the imposition of a prior restraint upon the expression of basic political and economic ideas. This would appear to be the most obvious constitutional flaw in the holding below.

Another constitutional error, perhaps equally basic, is contained in the holding that a corporation only has First Amendment protection for speech relating to general political issues when such issues materially affect the corporation's business. (J.S. App. 13). The Court was right in recognizing that corporations have rights of freedom of speech (J.S. App. 12) but wrong in limiting those rights to speech as to matters materially affecting the corporate speaker. To limit the perimeters of corporate free speech to subject matters which materially affect the corporation is wrong in and of itself even without the added burden contained in the ruling that the corporation must factually demonstrate such materiality in order to speak. The limitation is especially offensive when it applies to communications concerning basic political and economic questions before the public. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966).

The messages contemplated by Appellants fall within the core area of First Amendment rights. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). What Appellants intended to do is protected by the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment.[16]

The Appellants are artificial persons and, as such, cannot act or communicate except through the intervention of some medium of expression, which, in turn, necessarily

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[16] At this time it is uncontrovertible that the due process clause of Section 1 of the Fourteenth Amendment prohibits the states from abridging First Amendment rights. *See Gitlow* v. *New York*, 268 U.S. 652, 666 (1925); *Schneider* v. *State*, 308 U.S. 147, 160 (1939); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940); *Staub* v. *City of Baxley*, 355 U.S. 313, 321 (1958); *Bigelow* v. *Virginia*, 421 U.S. 809, 811 (1975).

requires an expenditure of money. *Buckley* v. *Valeo*, 424 U.S. 1, 19 (1976). The clear wording of §8, buttressed by the holding of the court below, precludes corporate expenditures and contributions and thus corporate speech. The extent of Appellants' First Amendment rights is directly at issue.[17]

1. *Business Corporations Have First Amendment Rights*

The fact that Appellants are corporate entities, rather than individuals, associations, or business trusts does not deny them First Amendment protection.[18] This Court has consistently held that corporations are persons within the meaning of the due process clause of the Fourteenth Amendment, *e.g., Covington & Lexington Turnpike Rd. Co.* v. *Sandford*, 164 U.S. 578, 592 (1896), and, in particular,

[17] Appellants sought to make their views known only on an issue, not to contribute to the election of a candidate to state office. Since a prohibition on contributions to candidates raises serious First Amendment problems, *a fortiori*, a blanket ban on free trade in ideas must infringe upon First Amendment rights. *Cf. United States* v. *CIO*, 335 U.S. 106, 141, 144-45 (1948) (Rutledge, J., concurring); and *United States* v. *UAW*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting). As noted by Mr. Justice Rutledge, the Government admitted that the prohibition of expenditures in connection with any Federal election (by labor unions and corporations) by the Federal Corrupt Practices Act "does 'bring into play' the rights of freedom of speech, press and assembly." *United States* v. *CIO*, *supra*, 335 U.S. at 141. *See generally* Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. Rev. 900 (1971); Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U. L. Rev. 1033 (1965); and Comment, *Control of Corporate and Union Political Expenditures: A Constitutional Analysis*, 27 Fordham L. Rev. 599 (1958-59).

[18] Cases which question whether corporations are "citizens" within the privileges and immunities clause of Section 1 of the Fourteenth Amendment, *e.g., Western Turf Ass'n* v. *Greenberg*, 204 U.S. 359, 363 (1907), are irrelevant because Appellants are only asserting rights which stem from the equal protection and due process clauses.

that corporations are entitled to First Amendment rights. In *Grosjean* v. *American Press Co.*, 297 U.S. 233, 244 (1936), this Court upheld the First Amendment challenge of nine corporations to the constitutionality of a Louisiana license tax, noting that a corporation was a person within the meaning of the equal protection and due process clauses, and that "freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process clause of the Fourteenth Amendment . . . ."[19]

It is clearly established that although a corporation is engaged in a business for profit, it and its expressions are nevertheless entitled to First Amendment protection. *See, e.g., Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501-502 (1952); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964).

Similarly it is now clear that even the expression of purely commercial speech is afforded protection under the First Amendment. *Linmark Associates, Inc.* v. *Township of Willingboro*, 45 U.S.L.W. 4441 (May 2, 1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). It is ironic that as to a certain segment of society the Supreme Judicial Court elevates purely commercial

[19] *See also, e.g., Pennekamp* v. *Florida*, 328 U.S. at 331 (1946); *United States* v. *CIO*, *supra*, 335 U.S. at 154-55 (Rutledge, J., concurring), in which Mr. Justice Rutledge observed that "corporations have been held within the First Amendment's protection against restrictions upon the circulation of their media of expression"; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Kingsley International Pictures, Corp.* v. *Regents*, 360 U.S. 684 (1959); *NAACP* v. *Button*, 371 U.S. 415, 428 (1963); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Lambert*, *supra* note 7, at 1060, *et seq.*; and Comment, *Control of Corporate and Union Political Expenditures: A Constitutional Analysis*, *supra* note 7, at 605. *Cf. Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-39 (1960).

speech to a higher plateau of constitutional recognition than speech relating to general economic and political ideas. For many years the United States Supreme Court struggled with the opposite proposition—whether the relationship of the desired speech to a business activity operates to undermine the First Amendment rights of the speaker. *E.g.*, *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). *Virginia Pharmacy* clearly rejected any suggestion remaining from *Valentine* that commercial speech is not protected. The debate is now turned upside down with a holding that would, in effect, accord a corporation's deodorant advertisement constitutional significance but permit the expression of opinion on a tax law, by a bank, to result in jail sentences for its officers.

Bigelow v. *Virginia*, 421 U.S. 809 (1975), a case which perhaps paved the way for *Virginia Pharmacy*, is instructive. This Court, in invalidating a statute which operated to prohibit an advertisement promoting abortion, pointed out that the advertisement "did more than simply propose a commercial transaction." *Id.* at 822. The Court stressed that the "advertisement conveyed information of potential interest and value to a diverse audience." *Ibid.* The communication was afforded protection at least partly because it did transcend the merely commercial and undertook to convey a somewhat controversial message of some current public import. *Virginia Pharmacy* itself recognized that the particular message in that case, information concerning drug prices (whose suppression hits hardest the poor, the sick, and the aged, 425 U.S. at 763) was of considerable social significance and that, in general, society has a strong interest in the "free flow of commercial information." It is not so much the fact that the seller might make a profit which entitles business communications to constitutional protection. Nor is the identity, or organizational structure of the speaker (*i.e.* corporate versus trust versus

partnership, etc.) important. It is, rather, the public's interest in receiving ideas and information which forms the foundation for First Amendment protection.

2. *First Amendment Rights for Corporations Are Not Limited to Corporations Whose Business Is Communications*

While the bulk of the cases making clear that corporations have First Amendment rights deal with corporations in the communications, entertainment or publishing fields,[20] no case suggests that the First Amendment applies only to such corporations. The opinion of the court below does not, in so many words, say that it applies only to non-media corporations and that media corporations are free of the strictures of c. 55, §8.[21] This distinction must be implicit in the Court's holding, however, since the Court realistically could not contemplate that Section 8 could prohibit expenditures of a corporate publishing company with respect to publication of an editorial on a referendum question unless that question was one which materially affects the publisher. Whether the unspoken assumption is straight constitutional law (*i.e.*, media corporations have broader First Amendment rights) or whether it is statutory con-

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[20] *See* cases cited in n.19, *supra*. *But see Linmark Associates, Inc.* v. *Township of Willingboro*, 45 U.S.L.W. 4441 (May 2, 1977).

[21] The only reference to the problem appears in n.13 of the Court's opinion (J.S. App. 12). There the Court states that no one asserts that the statute "bars the press, corporate, institutional or otherwise from engaging in discussion or debate on the referendum question," and therefore the Court need not opine on such matters. Actually plaintiffs in their attack on the breadth of the statute had pointed out that newspaper editorials would seem to fall within the literal sweep of the prohibition; the fact that no one could seriously contend that the statute could validly proscribe expenditures for such editorials was precisely the point plaintiffs were attempting to make. It is hard to see how the Court could conclude that this consideration is irrelevant.

struction dictated by constitutional considerations (the statute is construed as inapplicable to media corporations in order to avoid constitutional infirmity), the distinction will not stand scrutiny. Full First Amendment protection for corporations is not limited to media corporations, and any limiting interpretation exempting only media corporations will not avoid the constitutional infirmity in the statute.[22]

The key point about the First Amendment is that it protects the right of the listener. As stated in *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967), concerning the right to report on matters of public interest:

> Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society.

And in *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969), a case not even involving publication of important public information, the Court stated:

> It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] . . . necessarily protects the right to receive . . . ." [citing cases] This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society. [citations omitted.]

Again, in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969), it is said:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . .

[22] See *Buckley, supra*, 424 U.S. at 51 n.56, wherein this Court recognizes that exempting the institutional press from a statute limiting political expenditures cannot save the statute from First Amendment attack.

> "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). See Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

The cases decided by this Court make clear that the right of the public to receive and exchange ideas and information of any kind is of vital significance, *e.g., Virginia Pharmacy, supra* (commercial advertising); *Linmark Associates, supra* (real estate sales); *Procunier* v. *Martinez*, 416 U.S. 396, 408-409 (1974) (prisoners' mail); *Smith* v. *California*, 361 U.S. 147, 153 (books); and where the information relates to political and public matters it is the core concern of the First Amendment. *Branzburg* v. *Hayes*, 408 U.S. 665, 725-727 (1972) (dissenting opinion of Mr. Justice Stewart); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964); *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949); *DeJonge* v. *Oregon*, 299 U.S. 353, 365 (1937); *Stromberg* v. *California*, 283 U.S. 359, 369 (1931); *See also Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-763 (1972).

Viewed in light of the overwhelming significance to be accorded the right of the public to receive information, especially information of a broad political or economic nature,[23] one thing becomes immediately apparent: it is

[23] It bears emphasis that the instant case concerns the right to publicize a corporate belief as to a ballot question before the public. There is no question of candidate contributions at issue here. *See Schwartz* v. *Romnes*, 495 F.2d 844, 851 (2d Cir. 1974); *C & C Plywood Corp.* v. *Hanson*, 420 F. Supp. 1254 (D. Mont. 1976), *appeal docketed*, No. 76-3118, 9th Cir., Sept. 29, 1976; *Pacific Gas & Electric Co.* v. *Berkeley*, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976).

of little or no significance whether the source of the information is a media or non-media source. It is the right to receive the message which counts.

As an example: Appellant The First National Bank of Boston is the largest bank in New England and among the largest in the country. The ebb and flow of the economic and financial tides in Massachusetts form its life blood. A voter in Massachusetts, concerned with such economic issues as the tax rate, employment opportunities, and the ability to attract new business into the state, might be just as interested in hearing this bank's views on a proposed graduated income tax as, say, the views of *Playboy* magazine, *Sports Illustrated,* or even the editorial staff of *The Boston Globe* on this same subject. Yet these latter entities, being "media" corporations, could claim constitutional immunity from restraints of any kind on the expression of editorial policy, while the Appellant Bank would have to prove an essentially unprovable "material effect" before it could expend even $25 to publicize its views.

Entertainment-oriented business corporations may claim First Amendment protection for the expression of ideas inherent in topless dancing (*e.g., Doran* v. *Salem Inn, Inc.,* 422 U.S. 922 (1975)), the presentation of nude floor shows (*e.g., Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546 (1975)), and sexually-oriented motion pictures (*e.g., Kingsley International Pictures Corp.* v. *Regents,* 360 U.S. 684 (1959)). Logic would not indicate that the economic views of general business corporations and banks are of an inherently lesser order of constitutional significance. "[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . . ." *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 61 (1976).

If the right of the listener to hear is the paramount concern, the nature of the business of the speaker should be irrelevant. The court below never once alluded to the right of the people to hear, although this point was stressed throughout plaintiffs' presentation, and thereby missed the central thrust of the First Amendment. Not surprisingly, then, the constitutional lines drawn in the opinion are erroneous.

3. *Freedom of Expression Cannot Be Limited to Matters Materially Affecting the Speaker*

If the boundaries of First Amendment protection for speech concerning broad economic matters are not to be drawn between corporations and other entities, nor between media corporations and other business corporations, then no logic can be discerned in drawing the boundary between speech about a topic which materially affects the corporate assets and speech which has no such material effect. If the crux of the protection concerns the listener's right to hear, then it becomes irrelevant how important or unimportant the message might be deemed to be to the corporate speaker. The Constitution protects speech which the speaker deems to be less than vital just as surely as it protects speech which is important to the speaker.[24]

If a business corporation can be forbidden by the criminal law to communicate except as to matters materially affecting its business, may religious corporations be precluded from communicating except as to matters materially affecting religion? May civil liberties unions be forbidden to communicate except as to matters materially affecting civil liberties? May charitable corporations be forbidden to

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[24] *A fortiori* the protection ought to be afforded communications which the corporate management *believes* to concern a matter materially affecting the corporation, even if a jury were to disagree with management's judgment.

express views except as to matters directly pertaining to the objects of their charitable concern? As this Court has on many occasions made clear, the fact that the speaker is engaged in profit-making activity is not the criterion by which to judge whether or not constitutional protections exist. Presumably if business corporations may be made to "stick to business" (as was argued below), then other entities may be similarly circumscribed in accordance with what is perceived to be properly "their business."

If the public good is thought to be served in some way by keeping the activities of corporations and other organizations reasonably close to the purposes for which they exist, that end is served by leaving it to the shareholders or members to pursue whatever avenues are available within the structure of the organization or the applicable civil law. *See Cort* v. *Ash*, 422 U.S. 66 (1975). The heavy hand of the criminal law should not be used to punish the expression of ideas. If a state statute attempts to do so, a constitutional shield comes into play. It is error to assume that the scope of this shield is limited to the narrow concept of "materiality" found in the offending statute itself.

Buckley v. *Valeo*, 424 U.S. 1 (1976), struck down a far less restrictive statute which limited, rather than prohibited, political expenditures. The prevailing parties included not only individuals but nonprofit corporations such as the New York Civil Liberties Union, Inc. This Court recognized in *Buckley* that the freedom of expression of associations as well as individuals is to be protected, in the interests of public debate, and throughout the opinion the broad sweep of First Amendment protection for individuals, associations and groups is emphasized. For example, at 19 it is stated:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. (Footnote omitted.)

See also Abood v. *Detroit Board of Education*, 45 U.S. L.W. 4473, 4480 (May 24, 1977).

Although there are numerous other grounds urged by Appellants herein, and numerous other issues which are raised by Section 8 and the opinion of the Supreme Judicial Court, it would appear clear that merely the *Buckley*, *Virginia Pharmacy*, and *Linmark* decisions, in and of themselves, would require reversal in this case.

The court below relied upon *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925), in holding that corporations only have First Amendment protection when speaking as to matters materially affecting the assets or business of the corporation. That case does not support the opinion below or the Attorney General's position. The case did not concern First Amendment rights and, in any event, was decided eleven years before *Grosjean* made clear that corporations, being "persons", do have First Amendment rights through the due process clause of the Fourteenth Amendment. Most importantly, no concept such as the paramount right of the public to receive information concerning important issues was even remotely at issue in *Pierce*. Of course, the decision in *Pierce* held that corporations did indeed have constitutional rights pertinent to the issues in that case, and in no respect is the case contrary to any contention urged by Appellants herein.

E. *Section 8 Cannot Survive the Strict Scrutiny Which Must Be Given It*

1. *Strict Scrutiny Was Not Applied by the Court Below*

Speech in a political or informational context, precisely the type of speech prohibited by Section 8, deserves the

highest degree of protection from governmental restraint.[25] In *Buckley, supra,* 424 U.S. at 14, this Court reiterated that a major purpose of the First Amendment was to protect uninhibited free discussion of governmental affairs. "This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uinnhibited, robust, and wide-open.' *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964)."

The statute cannot avoid strict scrutiny merely because it prohibits expenditures rather than directly prohibiting speech. In *Buckley,* the Court held that expenditure limitations are direct and substantial limitations on speech.

Because core First Amendment rights are at stake, the statute is not entitled to the usual presumption of validity afforded to legislation. *See Schneider* v. *State,* 308 U.S. 147, 161 (1939). "The presumption rather is against the legislative intrusion into these domains." *United States* v. *CIO,* 335 U.S. 106, 140-141 (1948) (Rutledge, J., concurring). Thus, the constitutionality of the prohibition challenged by Appellants turns on whether the governmental interests advanced by the state in its support can satisfy the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley, supra,* 424 U.S. at 44-45.

The court below clearly acknowledged that this statute operates in an area of First Amendment concerns. The Court states, J.S. App. 10:

> It is clear that an act which limits either contributions or expenditures "operate[s] in an area of the most fundamental First Amendment activities." *Buckley* v. *Valeo,* 424 U.S. 1, 14 (1976).

[25] "Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve." *Pennekamp* v. *Florida,* 328 U.S. 331, 346 (1946); "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964). See cases cited *supra,* and Hastie, *Free Speech,* 9 Harv. Civ. Rights—Civ. Lib. L. Rev. 428, 442 (1974).

Yet, throughout its First Amendment analysis, the Court did not acknowledge that there was any requirement that it subject the statute to exacting scrutiny, find a compelling interest served by the statute, or examine the statute without the presumption of validity which usually accompanies legislation.

In fact, throughout the First Amendment discussion (J.S. App. 9-21) the court does not even state what it believes the purpose of c. 55, §8 to be. The only reference is the following: "We cannot say that there was no rational basis for this legislative determination." (J.S. App. 14). What this "rational basis" is is not mentioned. This Court has stated, in *Bigelow* v. *Virginia,* 421 U.S. 809, 826 (1975):

> Regardless of the particular label asserted by the State—whether it calls speech "commercial" or "commercial advertising" or "solicitation"—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.

The task which the Massachusetts court failed to perform is thus inescapable. Later portions of the opinion make clear that it was not through mere inadvertence that the Court omitted reference to a duty to render strict scrutiny to §8. When discussing Appellants' equal protection attack the Court states (J.S. App. 22):

> We think that the appropriate standard of review on this issue is not the strict scrutiny that the plaintiffs suggest is apposite but, rather, is the traditional scrutiny involving economic matters.

In sum: an examination of the Court's opinion reveals that the court below failed to apply strict scrutiny, did not find a compelling interest served by the statute, and applied the usual presumption of validity in its analysis, all of which is contrary to principles enunciated by this Court.

2. *Section 8 Cannot Survive Strict Scrutiny*

If the statute is subjected to the rigorous scrutiny required by the Constitution, it must fail. In the first place, a clear statement of just what the purposes of this legislation are has yet to be enunciated, either by the Legislature, the Attorney General, or the court below.[26] In *FNB I* the two justices who reached the constitutional ques- did not believe the purposes to be compelling, 362 Mass. at 587-90, 290 N.E. 2d at 537-39. In any event, as argued below by the defendants, a two-fold purpose is assumed to relate to avoiding the undue influence upon the electorate which might occur if corporate money is allowed to flow into the publicity campaigns either for or against a particular referendum issue, and to precluding corporate money from being spent contrary to the political views of some of the shareholders.

This Court, in *Buckley*, held an analogous but more

[26] There is not much legislative history concerning the purposes underlying the provision in Section 8 concerning ballot questions. In *Ashley* v. *Three Justices of Superior Court*, 228 Mass. 63, 78, 116 N.E. 961, 966 (1917), *appeal dismissed*, 250 U.S. 652 (1919), it is stated with respect to the statute as a whole: "The whole purpose of the act is to promote and insure the freedom of elections by discouraging the improper influence of elections and the pollution of the ballot by corrupt practices." Corruption, however, cannot be of concern in a referendum ballot. As has been indicated in the discussion above, at pp. 30-31, the exact purpose of the legislative proviso that ballot questions pertaining solely to individual taxes will not be deemed materially to affect corporations is apparently to preclude corporations from attempting to influence voters to vote against a graduated income tax proposal, since the Legislature perceives its efforts to achieve such a tax frustrated by corporate opposition.

limited expenditure regulation unconstitutional. Section 608(e)(1) of the Federal Election Campaign Act, which the Court held unconstitutionally infringed upon First Amendment interests, did not even purport to prohibit all expenditures on political questions. It provided that "[n]o person may make any expenditure . . . relative to a clearly identified candidate which, when added to all other expenditures made by such person during the year . . ." exceeded $1,000. The statute defined "person" broadly to include "an individual, partnership, committee, association, corporation, or any other organization or group of persons." 18 U.S.C. §591(g).

The government in *Buckley* advanced two allegedly significant interests, both of which, the Court held, were not sufficiently compelling to justify limiting public discussion by limiting expenditures. The first was an interest in preventing corruption. The Court held that the independent expenditure limitation failed to stem either the appearance or reality of corruption while heavily burdening core First Amendment expression. *Buckley, supra*, 424 U.S. at 45. Whatever interest in curbing corporate expenditures in order to avoid creating political debts may still be deemed "compelling" in a candidate campaign after the Supreme Court's decision in *Buckley*, such an interest is totally unpersuasive when the object of the expenditures is the discussion of a constitutional amendment. *See Schwartz* v. *Romnes, supra*, 495 F.2d at 852-53; *Pacific Gas & Electric Co.* v. *Berkeley*, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976); *C & C Plywood Corp.* v. *Hanson*, 420 F. Supp. 1254 (D. Mont. 1976), *appeal docketed*, No. 76-3118, 9th Cir., Sept. 29, 1976. Informational corporate advertisements may influence voters, but the potential of corrupting the electoral process by currying favor with candidates or parties through advertisements of support is absent. *Cf. Schwartz* v. *Romnes*, 495 F.2d 844, 851 (2d Cir. 1974).

The second interest advanced by the government was the desire to equalize the relative ability of individuals and groups to influence the outcome of an election. This interest was rejected out-of-hand:

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by §608(e)(1)'s expenditure ceiling. But *the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,* which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " ' to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " . . . The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion. (Citations and footnote omitted) (Emphasis added)
>
> 424 U.S. at 48-49

Section 8 does not merely limit expenditures and contributions by corporations. It totally prohibits them.[27] The interpretation of the court below leaves the total prohibi-

[27] While this Court in *Buckley* did uphold the $1,000 contribution limitation appearing in the federal act, it did so only as a result of the very strong policy in favor of curbing the fact or appearance of corruption with respect to candidate contributions. 424 U.S. at 26. Since no such policy exists as to ballot question campaigns, and since Section 8 prohibits rather than limits contributions, *Buckley* principles necessitate that Section 8 be held unconstitutional both as respects contributions to referendum committees and direct expenditures.

tion intact as to Appellants or any others who do not affirmatively prove that an individual tax ballot question materially affects them. If "equalizing" the ability of groups to influence the outcome of an election is impermissible, *a fortiori* silencing one element of society is impermissible. In *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), this Court held that a statute requiring a newspaper to make space available for an advertisement of a political candidate was unconstitutional under the First Amendment. A legislature unable to *require* full discussion of a public issue without unconstitutionally infringing upon First Amendment interests certainly cannot, as the Court pointed out in *Buckley, supra,* 424 U.S. at 50-51, *curtail* debate on public issues.[28] Just as "[t]he legislative restraint involved in *Tornillo* . . . pales in comparison to the limitations imposed by §608(e)(1)" (424 U.S. at 51), the limitation involved in *Buckley* pales in comparison to the absolute prohibition imposed by Section 8.

An essential difference between the prohibition attacked by Appellants in the instant case and the expenditure limitation considered by the Court in *Buckley* is that the former alone encompasses expenditures on non-partisan questions submitted to the public for a vote. Thus the Court, in order to rule in favor of Appellants, need not decide whether *Buckley* forbids any limitation on corporate expenditures relative to *candidates and political parties.*[29] In *Schwartz* v. *Romnes, supra,* 495 F.2d at 844, the court, in order to avoid a statutory interpretation that would infringe upon the First Amendment rights of corporations, narrowly construed a state statute which prohibited corporations from making expenditures for any political

[28] This Court recognized that *Tornillo* involved a restraint upon the news media but deemed that factor to be irrelevant. *See Buckley, supra,* 424 U.S. at 51 n.56.

[29] *See* n.17, *supra.*

purpose as not prohibiting expenditures for the purpose of communicating a corporation's views on a referendum question. As set forth below, the court's opinion, 495 F.2d at 851, explains why corporations are entitled to greater protection with respect to expenditures and contributions concerning questions before the voters than with respect to partisan political contributions:

> By their very nature referenda, which have dealt principally with constitutional amendments and matters of governmental finance . . . do not lend themselves to those corrupting influences which prompted the enactment of §460. Corporate funds paid to a candidate or political party have the potential of creating debts that must be paid in the form of special interest legislation or administrative action. In contrast, when the issue is one to be resolved by the public electorate monies paid by a corporation for public expression of its views create no debt or obligation on the part of the voters to favor the corporate contributor's special interest. Although large private companies have undoubtedly been tempted to "buy" the election of political candidates in the expectation of receiving favors if their candidates should be elected, it is difficult to see how such motivation would play any substantial role in an attempt to influence votes for or against a referendum. The public remains completely free to reject the views of the corporate contributor . . . without fear of retribution or non-support by the corporate contributor. The requirement of §320 [analogous to Mass. Gen. Laws c. 55, §22] that the corporation publicly disclose such expenditures minimizes the risk that the public will be misled as to the source of inspiration of the corporately-financed views.

The alternative state interest—a desire to prevent use of corporate funds from supporting or opposing political issues (as opposed to candidates or parties) in opposition to the wishes of stockholders—was not considered in *Buckley*[30] but this interest is not compelling or even plausible, and, as discussed below, there are less restrictive ways a legislature might achieve such an objective. Corporate expenditures or contributions with respect to a proposed constitutional amendment are similar in concept to regular corporate activities in favor of or against the passage of legislation reasonably believed to affect a corporation's interests. No Massachusetts statute purports to forbid corporate lobbying. Stockholders have no extraordinary rights to control, overrule, or prevent a decision to support or oppose the passage of legislation which management deems to affect the best interests of the corporation, whether or not some stockholders may perceive the legislation as in their overall personal best interests.[31] The fact that the focus of the persuasive effort as to a proposed

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[30] In *Cort* v. *Ash*, 422 U.S. 66, 81 (1975), this Court noted that the legislative history of §610 indicated that "protection of ordinary stockholders was at best a secondary concern." Moreover, the protection of minority interests against misuse of aggregated funds would seem to be more acute with respect to labor unions than with corporations. *Cf. Abood* v. *Detroit Board of Educ.*, 45 U.S.L.W. 4473, 4479 (May 24, 1977). Union members are compelled to pay dues, whereas corporate employees do not usually contribute funds to a corporation as a condition of their employment. In addition, corporate shareholders who disagree with the use of corporate funds for political purposes may dispose of their shares or perhaps commence a derivative suit against corporate management for an *ultra vires* expenditure. *Cort* v. *Ash, supra*, 422 U.S. at 81 n.13. Yet Section 8 does not, because of perceived constitutional difficulties, regulate labor unions. *See Bowe* v. *Secretary of the Commonwealth*, 320 Mass. 230, 69 N.E.2d 115 (1946).

[31] There is nothing in the record to indicate shareholder dissatisfaction with the plaintiffs' proposed expenditures. Management of each of the Appellants concluded that the proposed constitutional amendment would adversely affect the corporation. (A. 17). The boards of directors were informed of the suit and three formally ratified its commencement. (A. 26)

change in the law is the public at large rather than individual legislators provides no compelling reason to silence corporations. To permit corporations to expend funds to persuade legislators but to forbid expenditures to persuade the public is absurd; to prohibit either is unconstitutional. *Cf. Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Furthermore, the fact that only one ballot question has been singled out for special treatment undermines the likelihood of any genuine state interest in protecting shareholders. It is not rational to assume that a question dealing solely with individual income tax is the only ballot question likely to concern shareholders.

It is inconceivable that the interests of the state can be held sufficiently compelling to justify the elimination of non-partisan speech which may, and is designed to, assist voters in making their decision.[32] In this case as in *Bigelow* v. *Virginia, supra,* 421 U.S. at 822, Appellants' "First Amendment interests coincided with the constitutional interests of the general public."

In the area of the free exchange of ideas this Court has stricken statutes furthering the "[i]ndisputably . . . strong interest" in maintaining high professional standards, *Virginia Pharmacy, supra,* 425 U.S. at 766, and the "vital

[32] Assuming that some of the State's interests may be justifiable, the Legislature has not even attempted to adopt the least restrictive alternative available. First Amendment rights may never be restricted beyond what is reasonably necessary. *See, e.g., United States* v. *CIO, supra,* 335 U.S. at 146 (Rutledge, J., concurring); *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). *See also* Comment, *First Amendment—Corporate Freedom of Speech,* 7 Suffolk U. L. Rev. 1117, 1127 (1973). For example, Section 8 bars, instead of merely limiting, all expenditure on the ballot question at issue. Furthermore, any interest in preventing the use of corporate funds to express political viewpoints contrary to the desires of shareholders might be attempted to be satisfied by requiring a majority vote of shareholders for political expenditures, or perhaps notification to the shareholders. Appellants take no position, of course, as to the constitutionality of any less restrictive alternative.

goal . . . promoting stable, racially integrated housing," *Linmark Associates, supra,* 45 U.S.L.W. at 4444. The interests served by §8 are measurably less substantial. *See Buckley, supra,* 424 U.S. at 44-51.

If this Court upholds the blanket ban upon the expression of economic ideas at issue here, the Legislature would feel free to forbid expenditures against other proposed constitutional amendments which it fears may not survive the test of uninhibited debate. The ability of the public to cast a meaningful vote on ballot questions would be markedly diminished and the election result itself would be suspect.[33] Justice Holmes' dissent in *Abrams* v. *United States,* 250 U.S. 616, 630 (1919), best expresses the reason why no statute curtailing debate on a public issue should be allowed to stand:

> If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition . . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment . . . . While that experiment is part of our system I think that we should be eter-

[33] As one commentator has pointed out, "[w]ide ranging regulation of elections inevitably raises doubts as to the legitimacy of the outcome." *Developments in the Law—Elections,* 88 Harv. L. Rev. 1111, 1235 (1975).

nally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

F. *As a Minimum: The First Amendment Should Be Held To Protect Corporate Speech Where, As Here, Corporations Believe Their Material Interests To Be Affected*

As has been shown above, the opinion of the court below is a constitutional opinion construing the First Amendment. From pages 9 to 21 of the Appendix to the Jurisdictional Statement there is set forth the Court's "First Amendment Considerations." The holding, at page 13, is that First Amendment protection is afforded to corporate speech on general political issues only where those issues materially affect the corporation. The statutory proviso, deeming not material those questions which pertain solely to individual taxes, will be "invalid" only as to corporations which have "demonstrated that the proposed amendment does in fact materially affect their business." (J.S. App. 14). This is an interpretation of the United States Constitution, not an interpretation of a Massachusetts statute. As such it is obviously subject to direct review and modification by this Court.

While Appellants can perceive no way in which the opinion of the lower court can survive the constitutional scrutiny discussed above, this Court could reverse the decision of the Massachusetts court on grounds which, while still of constitutional dimension, are somewhat narrower than those urged in some other portions of this brief.

At the very least this Court should hold that the First Amendment does protect freedom of expression for corporations and that, while it may not be clear where the outer boundaries of such protection lie, they at least cover proposed publication of views through expenditures and contributions to oppose a state constitutional referendum question which concerns itself with individual taxation where management of the particular corporations desiring to publicize their views believe the corporations' material interests to be affected and the record does not show such beliefs either to be unreasonable or held in bad faith. A broader holding can be justified in this case, where the subject matter concerns the vital process of access by the public to general political and economic views. Clearly though, the holding suggested above is a minimum if this Court is to continue to safeguard our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

The record establishes that each of the Appellants has its roots deep in the local economy and that each has, as well, extensive contacts with individuals and their finances. All of the Appellants have numerous highly skilled and highly paid individuals in their employ (A. 17-18, 20-22); the ability to attract and to keep such individuals obviously may be adversely affected by the tax climate in the state with respect to individuals. Moreover, each of the Appellants has a sizeable payroll (A. 17-18, 20-21); the amount of the take-home pay of individual employees is clearly significant to the Appellant corporations, for example, in salary negotiations and bonus payments. *See Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 650, 183 N.E.2d 871, 873 (1962). In addition, the Appellant Banks have huge sums on loan to individuals or in individual deposit accounts (A. 18-19). The amount of after-tax cash available to

individuals would necessarily have an effect upon loan and deposit accounts.

Furthermore, at least one of the Appellants, Gillette, does a huge volume of sales business with Massachusetts consumers. Some $39,600,000 in sales were generated in Massachusetts in 1974 (A. 21). The amount of after-tax dollars available in the state naturally would be of concern to a corporation like Gillette.

The business of the Appellants is, in various ways, inextricably intertwined with the general business climate in Massachusetts. For example, the Appellant Banks, which have no branch offices in any other state (A. 19),[34] have literally billions of dollars on loan to, or in deposit accounts for, industrial and business concerns (A. 18-19). Rightly or wrongly, if the business community deems a graduated income tax as contributing to an unfavorable tax and business climate (*see Lustwerk,* 344 Mass. at 651, 183 N.E.2d at 874), the Appellant Banks, whose interests are tied to those of the business community, will be affected.

The record contains an express finding that "It is the position of the management of plaintiffs that a graduated income tax (and thus the proposed Constitutional Amendment) would adversely affect their business and property." (A. 17). The record then sets forth various ways in which the management of the various plaintiffs believe this adverse effect will occur. (A. 17 to 21). The Appellants' boards of directors were notified of the commencement of this action, and the shareholders of at least one of the corporations were directly apprised of the situation. (A. 26). The belief of these corporations that the graduated tax will materially affect them is stipulated;[35] that the

[34] This is a requirement of law. 12 U.S.C. §§36, 81. Mass. General Laws c. 168, §5; c. 170, §12; and c. 172, §11.

[35] Obviously by this time the commitment of the corporations to the effort to oppose a graduated tax has been further demonstrated by the decision to press this appeal.

belief is reasonable[36] emphatically emerges from the record.

The Supreme Judicial Court held that a reasonable belief as to the ballot question's material effect is not sufficient to enable corporations to expend or contribute:

> The plaintiffs further argue that all they need show is a "reasonable belief" that the proposed amendment would materially affect them. While such a belief is relevant to the question whether such an expenditure would be ultra vires, cf. *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 651 (1962), standing alone it is not relevant to the question presented herein.
>
> (J.S. App. 15 n.15)

The court below held that the First Amendment protection for corporate speech is exactly coterminous with the materiality test embodied in the first sentence of c. 55, §8 (J.S. App. 13). Thus, the Court gave the narrowest of interpretations to the First Amendment, holding it applicable only to questions materially affecting a corporation and then only if the corporation *proves* that material effect. At the same time the Court very broadly construed the statute itself, rejecting Appellants' suggestion that to save a statute from constitutional infirmity the Court might narrowly construe the "material effect" phrase and hold that a corporation's reasonable belief that a question would materially affect it would suffice to enable expenditures to be made.

In construing the statutory prohibition very broadly and the First Amendment protection very narrowly the court

[36] Nowhere in the record is there a suggestion that the management of any of the Appellant corporations is acting other than reasonably and in complete good faith. The common expectation is that officers and directors will act properly and regularly. *See, e.g.*, Jones, *Evidence*, §3.44 (1972), Fletcher, *Corporations*, §4601 (1976).

below has reversed the time-honored practice of courts grappling with sensitive issues in this area.[37] While this Court may not consider itself in a position to render its own narrowing interpretation of this state statute, *see Hynes* v. *Oradell,* 425 U.S. 610, 622 (1976), the Court clearly can free the First Amendment protection from the cramped confines imposed by the Massachusetts court's limiting interpretation. In restoring the First Amendment to more generous dimensions the Court may not feel compelled to outline its precise boundaries. It is respectfully urged, however, that the Court ought at least hold that no matter how the statute is interpreted, it simply cannot be allowed to forbid corporate communications on important public issues which corporate management reasonably believes to have a material effect on the corporation.

III. The Phrase "Materially Affecting Any of the Property, Business or Assets of the Corporation" Fails To Meet the Standard of Definiteness Required by Due Process

A. *Standard of Review Required of Criminal Statutes Affecting First Amendment Rights*

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the Constitution of the United States provides in part: "In all criminal prosecutions, the

[37] In particular it departed from its own practice in construing this very statute where twice before narrowing interpretations were rendered. *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 183 N.E. 2d 871 (1962); *FNB I*, 362 Mass. 570, 290 N.E.2d 526 (1972) (Opinion of three of five justices).

accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ."[38]

Due process requires that the terms of a penal statute be sufficiently clear to warn those subject to it precisely what activities are prohibited. Those portions of Section 8 affecting Appellants are unduly vague because they fail to draw reasonably clear lines between what corporate behavior is criminal and what is not. "Due process requires that all be informed as to what the state commands or forbids" (citation omitted) *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974).

The vagueness doctrine incorporates notions of fair notice or warning. *Id.* at 572. The standard test is whether the statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . ." *Connally* v. *General Const. Co.*, 269 U.S. 385, 391 (1926).

Moreover, when a statute's scope encompasses expression "sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith* v. *Goguen, supra,* 415 U.S. at 573. The "general test of vagueness applies with particular force in review of laws dealing with speech." *Hynes* v. *Oradell,* 425 U.S. 610, 620 (1976).

Section 8 not only fails to afford Appellants fair notice, but it also fails to provide adequate guidance to prosecutors or to the judiciary.[39]

[38] As noted earlier, *supra* at 36-37, corporations have been held to be "persons" within the meaning of the due process clause of the Fourteenth Amendment.

[39] *See generally* Comment, *Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77 (1948); Note, *The Void For Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).

B. *Section 8 Fails To Meet the Required Standard of Definiteness*[40]

Section 8 is unconstitutionally vague and indefinite because it does not indicate what expression and acts are prohibited. *See Herndon* v. *Lowry*, 301 U.S. 242, 259 (1937). Corporations may make contributions or expenditures with respect to ballot questions which "materially affect" "any" of their "property, business or assets." If the particular ballot question is one not deemed to have any effect on the property, business or assets, or if it is deemed to have an effect but not an effect which is "material", then heavy criminal sanctions will be imposed for any corporate expression, concerning that ballot question. The determination as to whether or not the ballot question has such a "material" effect will be made by a jury. Obviously, reasonable people might differ as to whether a particular question is one which would "materially affect" a particular corporation. The record bears out the problem. It is expressly found that "there is a division of opinion among economists as to whether and to what extent a graduated income tax on individuals would affect the business and assets of corporations." (A. 17). If experts differ among themselves, it is hard to see how the standard would be clear to "men of common intelligence." The Supreme Judicial Court, far from construing this phrase narrowly to reduce its threat, has compounded the problem by specifically stating that a reasonable belief as to the material effect is not enough. (J.S. App. 15 n.15). The right to spend money for purposes of communicating ideas is dependent upon a finding that the ballot question *in fact* materially affects the corporation.

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[40] The court below held that §8 created two crimes: spending money as to ballot questions which do not materially affect the corporation and spending as to questions solely concerning individual taxes. Both affect Appellants. The discussion here is as to the first, and is also relevant to the Court's holding that "materiality" is a prerequisite to First Amendment protection. (J.S. Ap. 13).

The ballot question in the case at bar—whether or not the state constitution should be amended to allow graduated rates to be imposed upon individuals—perfectly illustrates the dilemma posed by this vague standard. Does this question "materially affect" Appellant corporations? There would be no effect upon corporations if the amendment passes but the Legislature in fact never uses the power granted to it and graduated rates never are imposed, but it would be years before this "non-effect" could be known. If the Legislature were to utilize its new-found power and enact a very modest graduated tax, perhaps there would be no immediate effect on any corporation. However, if in years to come the degree of graduation increased, it may approach a point where a corporation would lose higher paid management and employees. When would the effect reach a level which would be deemed by the jury to be "material"? Management might think the loss of a single key engineer "material"; the jury might think the effect not material until, say, 15% of the labor force left.[41]

Is "material effect" to be measured in absolute or relative terms? A $5,000 decrease in net income brought about by the graduated tax might be deemed "material" in the sense that it is a large amount of dollars. If it were less than 1% of the particular corporation's net income, however, perhaps it would not be deemed "material" enough by the jury to warrant a corporation's referendum expenditure.

Does "property, business or assets" refer only to assets within Massachusetts? A national corporation may suffer

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[41] Because of the nature of the ballot question, even the Attorney General admitted that proof of materiality in advance of passage and legislative action was impossible. The Brief of the Defendant stated, p. 66:

> This Court would have to engage in pure speculation as to the type of tax, the gradation and the extent of the tax that would be imposed before it could determine whether it would more likely than not have a material effect.

a "material effect" on income generated in Massachusetts, but its consolidated balance sheet may not reveal any material impact.

It is true that there are criminal statutes, notably in the antitrust field, which employ less than precise standards and which have been upheld against attacks on vagueness grounds. *E.g., United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963) (Robinson-Patman Act: knowingly selling below cost for purpose of destroying competition). A statute whose major purpose and sole effect is to proscribe the communication of ideas must speak with greater precision. As this Court stated *id.* at 36:

> [T]he approach to "vagueness" governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute "on its face" because such vagueness may in itself deter constitutionally protected and socially desirable conduct. See *Thornhill* v. *Alabama*, 310 U.S. 88, 98 (1940); *NAACP* v. *Button*, 371 U.S. 415. No such factor is present here where the statute is directed only at conduct designed to destroy competition, activity which is neither constitutionally protected nor socially desirable.

Although general terms in a statute may on occasion be made sufficiently definite by reference to the remaining context of the statute itself,[42] or well-settled common law meaning,[43] such techniques are not available to cure the vagueness of Section 8. Moreover, there has been no narrowing interpretation of Section 8 by the courts of the

[42] *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921).
[43] *Nash* v. *United States*, 229 U.S. 373 (1913).

Commonwealth. Indeed the Supreme Judicial Court admitted that the phrase "materially affects" was vague but did not deem it necessary to resolve the vagueness questions raised by Appellants. (J.S. App. 19). Nor have there been any interpretations by public officials to guide those who might be affected by the statute.

The chilling effect of this statute necessarily limits discussion of the effects of a graduated personal income tax in Massachusetts. *Cf. Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972).

> [I]t has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes.
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> *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973)

Appellants in this case have refrained from expending any funds to communicate their ideas on the matter despite the belief of the management of each of the Appellants that the particular referendum question would in fact materially affect them. (A. 22 to 23). The chilling effect has been pronounced.

The very real chilling effect of this vague "materially affecting" standard is illustrated by the letter recently received by Appellant Wyman-Gordon, a copy of which is appended to this brief as Appendix A. The letter, referring to a corporate contribution to a committee supporting a local referendum proposing a city civic center, speaks more eloquently to this problem than a brief ever could.

Since the standard embodied in the statute is vague,[44] and is, if anything, becoming more vague the more often it is construed; since it has the propensity of self-censorship which the First Amendment seeks to avoid; since this propensity has been demonstrably realized in the chilling effect the statute had on these Appellants in the 1976 election; and since "government by referendum" is becoming dramatically more prevalent in recent years and will probably continue to expand;[45] it would seem appropriate to strike the "materially affecting" standard as void on its face. The undesirable self-suppression of socially valuable and protected expression warrants such a holding.[46]

Short of that, it is clear that the statute as applied to these Appellants is unconstitutional. If, contrary to the contention of the Appellants as argued above, this Court were to decide that the statutory standard has any propriety at all in this area, permeated as it is with First Amendment and due process concerns, the Court ought at least rule that a reasonable belief as to materiality on the part of corporate management will suffice to meet the standard, and that on this record these Appellants have in fact met any standard which the Constitution will tolerate.

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[44] The wording of §8 would not, for example, exempt a newspaper or other media corporation from its sweep. Presumably the printing of an editorial supporting a graduated income tax would cost money and the statute would seem to forbid this.

[45] In the November 1976 election there were a total of nine referenda questions before the voters in Massachusetts, dealing with issues such as public power, the rights of women, gun control and other matters.

[46] *See Thornhill* v. *Alabama*, 310 U.S. 88, 96-98 (1940).

IV. The Section 8 Prohibition Is Invalid as an Unconstitutional Denial of Equal Protection of the Laws

A. *Introductory Analysis*

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in part that:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

It was long ago clearly established that corporations can invoke the guaranty of equal protection of the laws under the Fourteenth Amendment. *See, e.g., Santa Clara County* v. *Southern Pacific Railroad,* 118 U.S. 394, 396 (1886); *Essex* v. *New England Telegraph Co.,* 239 U.S. 313 (1916).

Section 8 denies Appellants the equal protection of the laws for two reasons.

First, the criminal prohibition against expenditures for the purpose of publicizing corporate views on a ballot question which solely pertains to individual taxation does not prohibit other business corporations from expending corporate funds to communicate their views as to other ballot questions, as long as the "materially affecting" test is deemed satisfied.

Second, the criminal prohibition against expenditures for the purpose of publicizing views on referenda questions other than questions materially affecting the spender applies only to business corporations.[47] The statute does not similarly prohibit or restrict labor unions, voluntary associations, such as Massachusetts business trusts, charitable

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[47] The complete text of the statute appears at 3-4. While the statute enumerates various specific kinds of corporations in its text, Appellants believe that the generic term "business corporations" adequately covers them all.

corporations, or limited and general partnerships from communicating their views.

To illustrate: labor unions could spend thousands of dollars of their members' moneys promoting the unions' views as to the proposed graduated income tax constitutional amendment, whereas Appellants must remain silent, and corporations which wish to communicate views on other ballot questions face no presumption against materiality (found in the language of the second sentence of §8) or separate crime forbidding the communication (as the second sentence is construed by the court below). In each respect Appellants have been denied equal protection of the laws.

The discussion above at pp. 46-56 is pertinent to the equal protection analysis.

B. *Strict Scrutiny of Section 8 Is Required Because the Prohibition Impinges Upon Fundamental First Amendment Rights*

Any analysis of whether a statutory classification is a denial of equal protection begins with the question of whether the classification "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973).

There is no doubt that freedom of political expression is a fundamental right protected by the First Amendment. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 14. Nor is there any doubt, as discussed in Part II herein, that corporations are entitled to First Amendment protection. Furthermore, the fundamental rights of others to receive communications are affected by this classification even though they themselves are not the subject of the statutory classification. *Cf. Procunier* v. *Martinez*, 416 U.S. 396, 408-09 (1974).

The Supreme Court has applied the strict scrutiny test when the classification is one "affecting First Amendment interests." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 101 (1972) (Anti-picketing ordinance which exempted labor picketing held invalid under the Equal Protection clause). The First Amendment rights at issue in the instant case should be afforded the greatest possible protection because political discussion and the intelligent use of the franchise are at stake. "Discussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 14. *See also United States* v. *UAW*, *supra*, 352 U.S. at 570.

Because the statutory classification employed by the Massachusetts Legislature touches on a fundamental right, "its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." *Shapiro* v. *Thompson*, 394 U.S. 618, 638 (1969) (emphasis in original).[48] Furthermore, a legislative enactment subject to strict scrutiny will not be accorded the usual presumption of constitutionality. *See, e.g., Kramer* v. *Union Free School District*, 395 U.S. 621, 628 (1969). In fact, the burden is on the State, not the Appellants, to demonstrate "that [its enactment] has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives, and that it has selected the 'less drastic' means for effectuating its objectives." *San Antonio Independent School District* v. *Rodriguez*, *supra*, 411 U.S. at 17, quoting in part *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972).

The Supreme Judicial Court recognized that limitations upon electoral expenditures impose "severe restrictions on protected freedoms" and that thus §8 "potentially implicates the First Amendment." (J.S. App. 10). See the dis-

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[48] *See also, e.g., Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Kramer* v. *Union Free School District*, 395 U.S. 621, 628 (1969).

cussion at 45-48, *infra*. Yet, in its equal protection holding, the Court flatly refused to apply the strict scrutiny required where fundamental rights are at stake. The Court states (J.S. App. 22):

> We think that the appropriate standard of review on this issue is not the strict scrutiny that the plaintiffs suggest is apposite but, rather, is the traditional scrutiny involving economic matters. While we agree with the plaintiffs that where free speech is involved strict scrutiny is required (see *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 17 [1973]; *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 101 [1972]), we have already concluded that the plaintiffs do not possess First Amendment rights on matters not shown to affect materially their business, property or assets. Our inquiry, therefore, is whether the legislative classification "rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced [are] treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). See *Pinnick* v. *Cleary*, 360 Mass. 1, 27-28 (1971).

There are circular aspects to the Court's analysis. As noted above and earlier in this brief (pp. 45-48) the Massachusetts court clearly and explicitly acknowledges, as it must considering *Buckley* and other cases, that the offending statute operates *in the area* of cherished First Amendment rights. Given this premise, numerous decisions of this Court require strict scrutiny to be applied to the statute to determine whether its purposes are sufficiently vital and compelling. Then the means are to be examined once again with the strict, grudging and skeptical eye required when analyzing intrusions into the area of freedom

of expression. Only if the statute survives this grilling may it continue to carry out the legislative function entrusted it. Strict scrutiny thus describes a *process* called into play when the statute in question operates in a particular area; the process must be utilized to determine whether the statute may survive.

Instead of following this process, the court below, having determined that the statute operates in the First Amendment area, shifted its analysis to the First Amendment itself. There followed considerable discussion as to the abstract rights (or lack of rights) of corporations under the First Amendment. (J.S. App. 11-21). Are the rights derived from "property" or "liberty"? Does the First Amendment give corporations the exact amount of freedom of expression granted to natural persons? How closely must the speech be keyed to corporate assets before it may be considered protected?

It is almost as if the Court applied its strictest scrutiny to the First Amendment itself rather than to this statute. Considering abstract principles of constitutional law, the Court found corporations not entitled to protection for political or economic speech concerning questions not proven to have a material effect on the corporate assets. Then, having arrived at the conclusion that the plaintiffs had no First Amendment rights, the Court returned to the statute itself, noted that "We cannot say that there was no rational basis for this legislative determination" (J.S. App. 14),[49] and held that the statute did not offend the First Amendment.

The Court then used that result to justify the failure to render a strict scrutiny of the statute, its purposes and its methods under equal protection principles.

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[49] As has been noted before, the Court did not purport to describe what this "rational basis" is.

Strict scrutiny is not a label to be announced as applicable or rejected as inapplicable after a court has made a determination as to the substantive constitutional merits. It is the process by which the court should arrive at the constitutional decision in the first place. To invoke strict scrutiny only after determining that there has been a violation of First Amendment principles would render completely moot the familiar equal protection principles referred to above. The Massachusetts court has misconceived its task. Application of strict scrutiny equal protection principles is not dependent upon an actual finding that the challenged statute is unconstitutional under the First Amendment. *See Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Having determined that the statute operated in an area of fundamental rights, the Court should have determined whether or not the classifications embodied in the statute served compelling interests.[50]

C. *The Section 8 Classification Formulated In Terms of the Subject Matter of the Communication Violates the Equal Protection Clause*

As the opinion of the court below makes clear, the language of Section 8 totally prohibits corporations from spending moneys on only one particular ballot question: an individual tax question. (J.S. App. 23-24). On any other ballot question the statute allows corporations to spend moneys if the question materially affects their business, and the prosecutor has the burden of proving nonmateriality as one of the elements of the crime. *See* J.S. App. 23-24. Under

[50] The instant case is not an isolated instance of the Supreme Judicial Court's emasculating methodology with respect to equal protection principles in the area of freedom of expression. *See Commonwealth* v. *707 Main Corp.*, Mass. Adv. Sh. (1976) 2643, 2649-51, 357 N.E.2d 753; *Commonwealth* v. *Ferro*, Mass. Adv. Sh. (1977) 761, ___ N.E.2d ___.

the language of the statute, therefore, there is a great difference in the treatment of ballot questions directly dependent upon the content of the question.[51]

The statute thus creates an impermissible classification based solely upon the content of speech, a classification which cannot withstand strict scrutiny and one which furthers no rational permissible governmental interest. Certainly, no interest in protecting minority shareholders from the misuse of aggregated funds is plausible when on any question except one relating to the graduated personal income tax, their assumed plight is ignored by the Legislature provided the management of the corporation deems the question to be material. Similarly, the State cannot justify even a rational interest in preventing undue influence on the electorate when only one ballot question is singled out for special treatment.

The only operative distinction between the type of communication attempted to be totally prohibited and the type of communication limited to materiality is the subject matter of the communication. The prohibition against communications with respect to an individual income tax ballot question can stand only if that particular ballot question is clearly more prone to undue influence or shareholder dissatisfaction than any other.

However, the State is not free to make any such generalized assumption. In *Police Department of Chicago* v. *Mos-*

[51] The Court's First Amendment analysis may lessen the difference somewhat. As noted *supra*, pp. 25 to 28, Appellants assume the Court's opinion would allow a corporation to spend money as to a question solely pertaining to individual taxes if the corporation affirmatively proves its assets materially affected. There may be some doubt as to this. *See* J.S. App. 23-24. Assuming this to be so, however, there is still a vital difference in the consequences of corporate spending depending upon the content of the ballot question. Conviction or acquittal would likely depend upon allocation of the burden of proof where the issues of economic materiality are amorphous.

ley, 408 U.S. 92 (1972), this Court struck down as unconstitutional on equal protection grounds a statute which permitted labor picketing but prohibited non-labor picketing, despite the city's argument that non-labor picketing was more prone to violence. The Court held that a city could not distinguish among picketing and focus on subject matters, as opposed to the abuses which it wished to control. Just as "Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject," *id.* at 101, Massachusetts may not vindicate its interest in preventing misuse of aggregated funds by the attempted wholesale exclusion of speech on one subject but toleration of communications on all other subjects deemed material. *See also Niemotko* v. *Maryland,* 340 U.S. 268 (1951).

The only purpose served by the second sentence of the statute is to attempt to ensure that the voters are not exposed to the views of the business community. Such a purpose, as the Court stressed in *Mosley, supra,* 408 U.S. at 95-96, is blatantly impermissible:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."
> (Citations omitted.)

D. *The Statutory Classification Differentiating Corporations From Other Entities Cannot Withstand Strict Judicial Scrutiny*

The State's presumed interests in ensuring an election free from the "undue" influence of wealth and possibly in protecting minority interests against the misuse of aggregated funds are not sufficiently compelling to justify prohibiting Appellants, and other business corporations, from expending any money to express their views on the proposed constitutional amendment while permitting labor unions, voluntary associations such as Massachusetts business trusts, charitable corporations and partnerships, to expend or contribute unlimited sums of money to express their views.[52] The classification is certainly not "necessary to achieve the articulated state goal." *Kramer* v. *Union Free School District, supra,* 395 U.S. at 632. This Court has found a governmental interest in preventing corruption inadequate to justify *limitations* on expenditures with respect to political candidates and held that any governmental interest in preventing "undue" influence (beyond corruption) was improper. *Buckley* v. *Valeo, supra,* 424 U.S. at 48. The statute attacked by Appellants is even less justifiable than the statute challenged in *Buckley;* it totally prohibits, not merely limits, expenditures and contributions and it relates to the expression of opinions concerning a non-partisan issue not involving support of or opposition to political candidates.

The State must prove that "a fair and substantial relation" exists between the classification and the objective. *Reed* v. *Reed,* 404 U.S. 71, 76 (1971). Equally important, the State must demonstrate that the means chosen are precisely tailored to achieve the objective and that there

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[52] There is no Massachusetts statute imposing any kind of "materiality" test upon these other organizations.

are no less restrictive alternatives. *Sugarman* v. *Dougall*, 413 U.S. 634, 642-43 (1973); *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964). That the State cannot possibly do.

Finally, even if a classification is reasonable and there is no less restrictive alternative available, the statute may nevertheless be invalidated if the State interests are not sufficiently "compelling" to override the interest jeopardized by the classification. *See, e.g., Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968); *Shapiro* v. *Thompson, supra*, 394 U.S. at 638; *Kramer* v. *Union Free School District, supra*, 395 U.S. at 632 n.14.

The purposes of the State, assuming such purposes are permissible, could be accomplished by less restrictive alternatives — by limiting the amount corporations could spend to publicize their views with respect to the proposed constitutional amendment,[53] by limiting the dollar amount of contributions by corporations to political committees,[54] or by requiring the consent of a majority of the stockholders of corporations making expenditures or contributions.[55] Prohibiting rather than limiting corporate expression with respect to the graduated income tax question is the broadest possible method of achieving the State's purpose—180 degrees away from the constitutionally mandated least restrictive alternative concept.[56]

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[53] Of course, while this is less restrictive, even this less restrictive alternative would appear to be unconstitutional under *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

[54] Held constitutional in *Buckley, supra*, 424 U.S. at 29. By prohibiting corporations from expressing any views whatever, rather than by limiting the amount such corporations could contribute, it appears as if the Legislature wishes the voters not to have access to the views of the business community. Such a purpose is, of course, impermissible. *Id.* at 48-49.

[55] The present statute would prohibit expenditures even if unanimously voted by the shareholders.

[56] The General Court has already adopted a less restrictive alternative in Mass. Gen. Laws c. 55, §22 which requires disclosure of contributions and expenditures.

E. *The Statutory Classification Differentiating Corporations From Other Entities Fails Rationally to Further the State's Purposes*

Even if the statute did not impinge upon a fundamental right, it must, to be constitutional, rationally further the State's purpose and not constitute an invidious discrimination. *San Antonio Independent School District* v. *Rodriguez, supra*, 411 U.S. at 17. Any judicial scrutiny, strict or relaxed, will invalidate the Section 8 prohibition.

In order to be valid, the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). Section 8 produces a classification based upon no real or substantial differences which have any reasonable relationship to its assumed purposes.

Assuming the doubtful propriety of a State's being interested in preventing "undue influence"[57] (as opposed to corruption) by wealthy interests over individual income tax ballot questions or the discussion of political issues generally, the State's interest is not reasonably furthered by the classification chosen. Wealth, which in large part determines the ability to communicate and the incentive to seek to influence the electorate, are as great with respect to some of those groups excluded from the statutory classification as with respect to those within the classification. For example, as set forth in the Appendix at pp. 24, 30, there are many large and wealthy unincorporated Real Estate Investment Trusts (REITs) organized under the

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[57] The Supreme Court unambiguously rejected the propriety of a governmental interest in balancing voter exposure to political debate in *Buckley, supra*, 424 U.S. at 48-49. *A fortiori*, controlling "undue" influence by silencing one group is impermissible.

laws of Massachusetts,[58] which are not regulated in any way by Section 8. Twenty of these Massachusetts REITs have combined assets of $5,458,901,000. (A. 24). There are more than 7,500 business trusts, including REITs, with transferable shares organized under the laws of Massachusetts. (A. 24). These trusts are in many respects the functional equivalent of corporations — for example, each provides for centralized management, freely transferable shares and, generally, limited liability of shareholders.[59]

In short, a blanket prohibition against a REIT's spending *any* money with respect to an individual income tax question might be unconstitutional for reasons set forth in other sections of the Appellants' brief, but prohibiting only Appellants and other business corporations, and not REITs, cannot be justified on the basis of any difference between these entities. Regardless of whether there are constitutional or other limitations which would preclude including Massachusetts business trusts within the scope of Section 8, it is unconstitutional for the state to include corporations such as the Appellants and exclude Massachusetts business trusts.

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[58] REITs are organized in such a way as to take advantage of various tax benefits under §§856-858 of the Internal Revenue Code, and one requirement is that a REIT be "an unincorporated trust or an unincorporated association," and have 100 or more shareholders. Section 856(a) Int. Rev. Code of 1954, as amended. The primary Federal income tax benefit is that income from real estate and certain other investments can be distributed to shareholders with no tax imposed at the corporate level. *See generally* Aldrich, *Real Estate Investment Trusts: An Overview*, 27 The Business Lawyer 1165 (1972). The author notes that the federal tax treatment "has created its enormous popularity." *Id.*

[59] The choice between operating a business in the form of a corporation or a business trust has usually been determined by tax considerations. The Internal Revenue Code generally treats Massachusetts business trusts as "associations" taxable as corporations for Federal income tax purposes. *See generally* Int. Rev. Code of 1954, as amended, Reg. §301.7701-2, and regarding REITs, *see* Int. Rev. Code of 1954, as amended, §856(a)(3). Thus on the federal level there is usually no difference between operating in the form of a corporation or a business trust.

It is inconceivable that the State can justify, under any standard of rationality designed to prevent the "undue" influence of wealthy interests, a classification which has the effect of including an incorporated neighborhood grocery store, while excluding, for example, the Chase Manhattan Mortgage & Realty Trust, a Massachusetts REIT, which had assets in 1975 of $940,643,000. (A. 30). Not only does a REIT, such as the Chase Manhattan Mortgage & Realty Trust, obviously have greater capacity to communicate its views with regard to the proposed constitutional amendment than the neighborhood grocery store, but it would also appear to have incentive to do so.

The fact that labor organizations are excluded from the class established by Section 8 further undercuts any rationality for the State's purposes of preventing "undue" influences of wealthy interests. Labor unions not only have the wealth to attempt to exert influence upon the electorate, but they also have the organizational manpower to act effectively.[60] Labor organizations have at least as much incentive as corporations to attempt to exert influence with respect to ballot questions concerning individual taxes.[61] "The history of union political actions supplies abundant proof that labor's interest in politics is as old as its interest in the closed shop or the union shop." Brief for

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[60] The record indicates there are 2250 individual local labor organizations in the state with a membership of 590,625. (A. 24)

[61] The complete prohibition against expression of a labor organization's view on any particular ballot question might be as violative of the First Amendment rights of unions as it is of corporations. *See Bowe* v. *Secretary of the Commonwealth*, 320 Mass. 230, 69 N.E.2d 115 (1946). If this Court strikes the prohibition on First Amendment grounds, it need never reach the equal protection question. Assuming the Court does reach the question, however, the classification adopted by the statute cannot stand. Unions, like corporations, can be reasonably regulated. *Id.* at 252-253. "That the State has power to regulate labor unions with a view to protecting the public interest is . . . hardly to be doubted. They cannot claim special immunity from regulation." *Thomas* v. *Collins*, 323 U.S. 516, 532 (1945). *See Abood* v. *Detroit Board of Educ.*, 45 U.S.L.W. 4473, 4480 (May 24, 1977).

AFL-CIO as Amicus Curiae, p. 14, *International Ass'n of Machinists* v. *Street*, 367 U.S. 740 (1961), cited in Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U. L. Rev. 1033, 1052 n. 86 (1965).

Finally, the State cannot claim a rational basis for its classification exists with respect to prevention of "undue" influence when it excludes general and limited partnerships[62] and charitable corporations, many of which control great wealth, as well as wealthy individuals.

The classification fails to rest upon any difference substantially related to the statute's possible secondary purpose: the protection of minority interests against the misuse of aggregated funds. The management of REITs and other business trusts are similarly centralized. Moreover, there are *always* minority shareholders of REITs, because of the requirements of the Internal Revenue Code that beneficial ownership of a REIT be held by 100 or more persons. Int. Rev. Code of 1954, as amended, §856(a)(5). Furthermore, the minority interests of a REIT deserve significant protection because a REIT may often be effectively controlled by a sponsoring real estate development organization or other sponsor. A distinction which forbids the incorporated corner drugstore, 100% owned by one individual and managed by a Board of Directors consisting of only the sole shareholder, from expressing its views on the proposed amendment while at the same time, in order to protect minority interests against the misuse of aggregated funds, permitting a REIT, held by hundreds of shareholders, to spend thousands of dollars advertising its position with respect to the same question is plainly irrational.

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[62] During 1972, the most recent year for which income statistics are available, the Statistical Abstract of the United States shows that there are 15,000 Massachusetts partnerships, which earned a total of $1,816,000,000 in business receipts. (A. 24).

Nor is it rational to justify the classification on the basis of protecting minority interests while labor organizations are excluded from Section 8. Indeed, this Court has recognized that union members may need greater protection than shareholders against potential misuse of aggregated funds. *Cf. United States* v. *CIO*, *supra*, 335 U.S. at 135-38 (Rutledge, J., concurring); and *Cort* v. *Ash*, 422 U.S. 66, 81 n. 13 (1975). *See also Abood* v. *Detroit Board of Educ.*, 45 U.S. L.W. 4473, 4479 (May 24, 1977). Labor union members are ordinarily compelled to pay dues as a condition of membership and membership is often crucial to job retention.

Historically, perhaps, it could be argued that it was justifiable for the Legislature in drafting the 1907 predecessor to Section 8 to include only business corporations within its scope. In 1907 corporations arguably represented the major aggregations of wealth.[63] Since 1907, however, labor unions and Massachusetts business trusts (including publicly-held trusts such as REITs), limited partnerships and charitable corporations have been established and prospered, and they now represent significant aggregations of wealth. (A. 24) Thus, whatever rationale may have once existed for the classification has evaporated; the lack of any remaining reasonable basis constitutes a constitutional defect.

As Congress became increasingly aware that unions represented large aggregations of wealth and influence, and thus presented "evils" in the political area similar to those thought to be presented by corporations, the FCPA was amended, in 1943 for the duration of the war, and

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[63] Although, even in 1907, Massachusetts business trusts, partnerships, charitable corporations, and wealthy individuals were commonplace. In this regard, it is interesting to note that early economic regulations were conceived of in terms of regulating "trusts." Witness the "anti-trust" laws and the early "trust busters."

"permanently" in 1947, to include labor organizations. The legislative history has been discussed as follows by Mr. Justice Frankfurter:

> And so the belief grew that, just as the great corporations had made huge political contributions to influence governmental action or inaction, whether consciously or unconsciously, the powerful unions were pursuing a similar course, and with the same untoward consequences for the democratic process.
> *United States* v. *UAW*, 352 U.S. 567, 578 (1967)

Whether the unfairness in the differences in treatment for essentially similar groups results from changing social and economic conditions which render invalid a classification which was once rational, *e.g.*, *Vigeant* v. *Postal Telegraph Cable Co.*, 260 Mass. 335, 157 N.E. 651 (1927), or whether it results from heightened sensitivity to inequities which have been present all along, *e.g.*, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 669-70 (1966), it is clear that the irrational pattern of the Section 8 classification cannot stand.

F. *Summary*

The classifications adopted in Section 8 are so arbitrary that the statute represents a clear denial of equal protection of the laws, regardless of which equal protection standard of judicial review is applied.

V. Section 8 Incorporates an Improper Presumption of Fact Concerning the Materiality of Ballot Questions Solely Concerning Individual Taxation Which Is Unreasonable and Violative of Due Process.

Before 1972, c. 55, §7 (the predecessor of §8) purported to forbid corporations from expending or contributing funds to publicize their views as to ballot questions except

as to ballot questions materially affecting the corporations. In 1972 a proviso was added which stated that no question concerning individual taxation was to be deemed materially to affect a corporation and in 1973 the word "solely" was added so that the proviso now reads:[64]

> No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

Prior to the 1972-1973 amendments, in accordance with principles and authorities acknowledged by the Supreme Judicial Court (J.S. App. 24), the prosecution would have had to allege and prove that the particular referendum question was not one which materially affected the corporation in order to obtain a conviction under Section 8.

The proviso which resulted from the 1972-1973 amendments obviously takes the form of a presumption. At least in form, then, the statutory proviso purported to supply one of the elements which the prosecutor would otherwise have to prove. Whereas before the prosecutor would have had to prove that an expenditure or contribution was made for the purpose of influencing the vote as to a question which did not materially affect the corporation, now the prosecutor would merely have to show that the expenditure was made to influence the vote on a ballot question solely pertaining to individual taxes. From the proven fact (the expenditure was for an individual taxation referendum question) would flow the presumed conclusion (the question is not one which materially affects the corporation). From the wording of the proviso ("no question . . . *shall be deemed* . . . .") and from an analysis of the legislative purpose, which was quite clearly to keep corporate funds

[64] The history of these amendments is described *supra* at 7-9.

out of graduated income tax referendum campaigns, it would seem clear that the presumption was intended to be conclusive.

Whether conclusive or permissive, this Court has clearly established that the power of a legislature to create presumptions is limited by "due process" restrictions. *Tot* v. *United States*, 319 U.S. 463 (1943); *United States* v. *Romano*, 382 U.S. 136 (1965); *Leary* v. *United States*, 395 U.S. 6 (1969). Where the statute imposes criminal penalties, the state must bear the burden of proving criminal guilt. *In re Winship*, 397 U.S. 358 (1970); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975).

The test to determine the validity of a statutory presumption used in a criminal statute was stated by this Court as follows:

> [A] criminal statutory presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.
>
> *Leary, supra*, 395 U.S. at 36

When a criminal statute is involved, the courts are particularly strict in examining the logical strength of legislative presumptions. *Bailey* v. *Alabama*, 219 U.S. 219 (1911); *Morrison* v. *California*, 291 U.S. 82, 92-97 (1934). *Compare Yee Hem* v. *United States*, 268 U.S. 178 (1925), *with Turner* v. *United States*, 396 U.S. 398 (1970).[65]

Appellants argued below that a conclusive presumption

[65] Permanent, irrebuttable presumptions, even in civil statutes "have long been disfavored under the Due Process Clauses . . .", *Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973), especially where they place a heavy burden on the exercise of protected freedoms. *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974).

in a criminal case was completely untenable. Even if the presumption were permissive it would violate the standards enunciated in the cases cited above. There being "no rational connection between the fact proved and the ultimate fact presumed," (*Tot, supra*, 319 U.S. at 467), the use of the presumption in this statute does not square with constitutional principles.

The court below held, however, that the proviso, although "inelegantly written" (J.S. App. 23) did not in fact create a presumption as to a previously defined crime. Rather, it created a new and separate (although somewhat related) crime. This new crime constituted expending money to influence the vote as to a referendum question which solely pertained to individual taxation. (J.S. App. 24). Materiality to the corporate business was no part of this newly created crime.

At the same time, however, the Court, in its First Amendment analysis, held that corporations cannot be prohibited from expending funds to communicate their views as to referendum questions which materially affect their assets. If a corporation demonstrated that the individual taxation ballot question materially affected its assets, the proviso would be "invalid" as to that corporation. (J.S. App. 14).

Appellants have addressed the First Amendment infirmities inherent in the Court's approach elsewhere in this brief. For present purposes it should be noted that the result of the statutory amendment and the Massachusetts court's interpretation of the First Amendment protection for corporations has produced the same result which the cases cited above have denounced. Whereas before the 1972-1973 amendment the prosecutor would have to prove nonmateriality in order to convict, after the amendment the corporation has to prove materiality in order to escape conviction. At best, then, the practical effect of the Court's

opinion has been to turn what looks like an irrebuttable presumption into a rebuttable presumption. Cases cited above make clear that irrational rebuttable presumptions have no place in the criminal law.

In short: the proviso looks like a presumption, acts like a presumption, and has the effect of a presumption. The principles embodied in the cases cited by Appellants require that it be stricken as offensive to due process.

VI. Conclusion

The will of the Legislature has been forcefully expressed over a number of years. The Legislature wants corporate money kept completely out of any campaign concerning the desirability of amending the Massachusetts Constitution to provide for graduated personal income taxes. The Supreme Judicial Court in 1962[66] and again in 1972[67] attempted to carry out constitutional principles yet save the statute. This the Court succeeded in doing. In 1976, however, there really was no way to avoid coming completely to grips with the constitutional questions. In this conflict between the Constitution and the will of the Legislature, the Constitution was the loser.

The Supreme Judicial Court in its attempt to "save" this statute was faced with a series of Hobson's choices. As this brief has attempted to show, the statute intrudes into a number of incredibly sensitive areas: freedom of discussion as to basic political and economic principles; the right of the public to hear; commercial free speech; the requirement of clarity and precision in the definition of criminal activity; the right to equal protection of the laws; the right to fairness in a criminal jury trial. Inevitably, any attempt

[66] *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 183 N.E.2d 871 (1962).
[67] *NB I*, 362 Mass. 570, 290 N.E.2d 526 (1972).

to shape the statute to avoid a conflict with one constitutional principle exacerbates its conflicts with other principles. The short answer is that the statute cannot be squared with the Constitution.

Appellants respectfully request that this Court reverse the decision of the Supreme Judicial Court and enter an order that Appellants, based upon the facts shown in this case, may not be forbidden from making direct expenditures or contributions to committees in order to publicize their views as to any ballot question pertaining solely to a proposed graduated income tax for individuals.

Appellants urge, in support of the requested order, that this Court make one or more of the following rulings:

1. That the proviso contained in the second sentence of Section 8 is unconstitutional on its face under First Amendment principles,
2. That the said proviso is unconstitutional, as applied to these Appellants, under First Amendment principles, as a denial of equal protection, and as a deprivation of liberty or property without due process of law,
3. That the first sentence of Section 8, insofar as it purports to forbid business corporations from expending or contributing to publicize their views on referenda questions except as to such questions which materially affect them is unconstitutional on its face under First Amendment principles,
4. That the said first sentence, as applied to these Appellants, is unconstitutional under First Amendment principles,
5. That the said first sentence, insofar as it prohibits corporate spending as to referenda questions but does not regulate in any way referenda spending

of labor unions, trusts, and other similar entities is unconstitutional, as applied to these Appellants, as a denial of equal protection.

Respectfully submitted,

FRANCIS H. FOX
E. SUSAN GARSH
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Attorneys for Appellants

APPENDIX A

[SEAL]

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
John W. McCormack State Office Building
One Ashburton Place, Boston 02108

March 11, 1977

Edward W. Bettke, Treasurer
Wyman-Gordon Company
105 Madison Street
Worcester, Massachusetts 01613

Dear Mr. Bettke:

It has come to my attention that Wyman-Gordon Company made a contribution to "People Who Say Yes To Progress", during the recent referendum campaign in Worcester.

General Laws Chapter 55, section 8 generally prohibits any business incorporated under the laws of Massachusetts or doing business in the Commonwealth from contributing to any committee for the purpose of affecting the vote on any ballot question, *unless that question materially affects any of the property, business or assets of the corporation.* Violations of this section are punishable by a fine on the corporation of up to $50,000 and a fine on any officer, director or agent authorizing the violation of up to $10,000 or imprisonment for one year or both.

The constitutionality of the statute was the subject of a recent suit brought against the Attorney General by a group of Massachusetts corporations interested in making contributions to oppose the graduated income tax amendment. The Supreme Judicial Court held that the statute was constitutional on its face and as applied to these corpo-

rations. The decision has been appealed to the United States Supreme Court, but the statute is currently in effect and will be enforced.

It is not clear to me that the business assets or property of your corporation were potentially "materially affected" by the question and it is my intention to undertake an independent inquiry to determine the legality of the contribution. Your cooperation will expedite that inquiry. If you have counsel, please refer this letter to him or inform me of his identity.

Very truly yours,

(s) THOMAS R. KILEY
THOMAS R. KILEY
Assistant Attorney General
Chief, Elections Division

APPENDIX B

Constitutional and Statutory Provisions

CONSTITUTIONS

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV, § 1

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts Constitution, Amendment Art. 44

Full power and authority are hereby given and granted to the general court to impose and levy a tax on income in the manner hereinafter provided. Such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property. The general court may tax income not derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements. Any class of property the income from which is taxed under the provisions of this article may be exempted from the imposition and levying of proportional and reasonable assessments, rates and taxes as at present authorized by the constitution. This article shall not be construed to limit the power of the general court to impose and levy reasonable duties and excises.

Massachusetts Constitution, Amendment Art. 48 IV § 4

Legislative Action.—Final legislative action in the joint session upon any amendment shall be taken only by call of the yeas and nays, which shall be entered upon the journals of the two houses; and an unfavorable vote at any stage preceding final action shall be verified by call of the yeas and nays, to be entered in like manner.

At such joint session a legislative amendment receiving the affirmative votes of a majority of all the members elected, or an initiative amendment receiving the affirmative votes of not less than one-fourth of all the members elected, shall be referred to the next general court.

Massachusetts Constitution, Amendment Art. 48 IV § 5

Submission to the People.—If in the next general court a legislative amendment shall again be agreed to in joint session by a majority of all the members elected, or if an

initiative amendment or a legislative substitute shall again receive the affirmative votes of at least one-fourth of all the members elected, such fact shall be certified by the clerk of such joint session to the secretary of the commonwealth, who shall submit the amendment to the people at the next state election. Such amendment shall become part of the constitution if approved, in the case of a legislative amendment, by a majority of the voters voting thereon, or if approved, in the case of an initiative amendment or a legislative substitute, by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such amendment.

Federal Corrupt Practices Act, 2 U.S.C. § 441b

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b)(1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of Title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination,

or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4)(A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) it shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their resi-

dence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the mak-

ing of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

Regulation of the Banking Business; Powers and Duties of National Banks

12 U.S.C. § 81. *Place of business*

The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

R.S. § 5190; Feb. 25, 1927, c. 191, § 8, 44 Stat. 1229.

12 U.S.C. § 36. *Branch Banks*

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

• • •

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated,

if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto . . .

• • •

(h) The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

R.S. §5155; Feb. 25, 1927, c. 191, §7, 44 Stat. 1228; June 16, 1933, c. 89, §23, 48 Stat. 189, 190; Aug. 23, 1935, c. 614, §305, 49 Stat. 708.

Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, as amended, Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 83 Stat. 1263

[NOTE: the terms of this statute are set forth as they existed at the time of the decision of this Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). The statute was subsequently amended by Pub. L. No. 94-283, 90 Stat. 496.]

18 U.S.C. § 591. *Definitions*

Except as otherwise specifically provided, when used in this section and in sections 597, 599, 600, 602, 608, 610, 611, 614, 615, and 617 of this title—

(a) "election" means (1) a general, special, primary, or runoff election, (2) a convention or caucus of a political party held to nominate a candidate, (3) a primary election held for the selection of delegates to a national nominating convention of a political party, or (4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President;

(b) "candidate" means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, to Federal office, if he has (1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, or (2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

(c) "Federal office" means the office of President or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

(d) "political committee" means any committee, club,

association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;

(e) "contribution"—

(1) means a gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business, which shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance thereof that each endorser or guarantor bears to the total number of endorsers or guarantors), made for the purpose of influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States;

(2) means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for such purposes;

(3) means funds received by a political committee which are transferred to such committee from another political committee or other source;

(4) means the payment, by any person other than a candidate or a political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purposes; but

(5) does not include—

(A) the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee;

(B) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities;

(C) the sale of any food or beverage by a vendor for use in a candidate's campaign at a charge less than the normal comparable charge, if such charge for use in a candidate's campaign is at least equal to the cost of such food or beverage to the vendor;

(D) any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate, or

(E) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines or other similar types of general public political advertising;

to the extent that the cumulative value of activities by any person on behalf of any candidate under each of clauses (B), (C), and (D) does not exceed $500 with respect to any election;

(f) "expenditure"—

(1) means a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States;

(2) means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and

(3) means the transfer of funds by a political committee to another political committee; but

(4) does not include —

(A) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(B) nonpartisan activity designed to encourage individuals to register to vote or to vote;

(C) any communication by any membership organization or corporation to its members or stockholders, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any person to Federal office;

(D) the use of real or personal property and

the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities;

(E) any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate;

(F) any communication by any person which is not made for the purpose of influencing the nomination for election, or election, of any persons to Federal office;

(G) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines or other similar types of general public political advertising;

(H) any costs incurred by a candidate in connection with the solicitation of contributions by such candidate, except that this clause shall not apply with respect to costs incurred by a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 608(c) of this title; or

(I) any costs incurred by a political committee (as such term is defined by section 608 (b)(2) of this title) with respect to the solicitation of contributions to such political committee or to any general political fund controlled by such political committee, except that this clause shall not apply to exempt costs incurred with respect to the solicitation of contributions to any such political committee made through broadcasting stations, newspapers, magazines, outdoor advertising facilities, and other similar types of general public political advertising;

to the extent that the cumulative value of activities by any individual on behalf of any candidate under each of clauses (D) or (E) does not exceed $500 with respect to any election;

(g) "person" and "whoever" mean an individual, partnership, committee, association, corporation, or any other organization or group of persons;

(h) "State" means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States; and

(i) "political party" means any association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization;

(j) "State committee" means the organization which by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Federal Election Commission;

(k) "national committee" means the organization which, by virtue of the bylaws of the political party, is

responsible for the day-to-day operation of such political party at the national level, as determined by the Fedral Election Commission established under section 310(a) of the Federal Election Campaign Act of 1971; and

(l) "principal campaign committee" means the principal campaign committee designated by a candidate under section 302(f)(1) of the Federal Election Campaign Act of 1971.

18 U.S.C. § 608. *Limitations on contributions and expenditures*

• • •

(b) (1) Except as otherwise provided by paragraphs (2) and (3), no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000.

(2) No political committee (other than a principal campaign committee) shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $5,000. Contributions by the national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States shall not exceed the limitation imposed by the preceding sentence with respect to any other candidate for Federal office. For purposes of this paragraph, the term "political committee" means an organization registered as a political committee under section 303 of the Federal Election Campaign Act of 1971 for a period of not less than 6 months which has received contributions from more than 50 persons and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made in a year other than the calendar year in which the election is held with respect to which such contribution was made, is considered to be made during the calendar year in which such election is held.

(4) For purposes of this subsection —

(A) contributions to a named candidate made to any political committee authorized by such candidate, in writing, to accept contributions on his behalf shall be considered to be contributions made to such candidate; and

(B) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(5) The limitations imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(6) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original

source and the intended recipient of such contribution to the Commission and to the intended recipient.

• • •

(e) (1) No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (c)(2)(B)) relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.

(2) For purposes of paragraph (1) —

(A) "clearly identified" means—(i) the candidate's name appears; (ii) a photograph or drawing of the candidate appears; or (iii) the identity of the candidate is apparent by unambiguous reference; and

(B) "expenditure" does not include any payment made or incurred by a corporation or by a labor organization which, under the provisions of the last paragraph of section 610, would not constitute an expenditure by such corporation or labor organization.

• • •

28 U.S.C. §1257(2)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • •

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Massachusetts General Laws Chapter 55 (as amended by Chapter 151 of the Acts of 1975). Disclosure and Regulation of Campaign Expenditures and Contributions.

§ 1. For the purpose of this chapter, unless a different meaning clearly appears from the context, the following words shall have the following meanings:

• • •

"Contribution", a contribution of money or anything of value to an individual, candidate, political committee, or person acting on behalf of said individual, candidate or political committee, for the purpose of influencing the nomination or election of said individual or candidate, or for the purpose of promoting or opposing a charter change, referendum question, constitutional amendment, or other question submitted to the voters, and shall include any: (1) gift, subscription, loan, advance, deposit of money, or thing of value, except a loan of money to a candidate by a national or state bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business; (2) transfer of money or anything of value between political committees; (3) payment, by any person other than a candidate or political committee, or compensation for the personal services of another person which are rendered to such candidate or committee; (4) purchase from an individual, candidate, or political committee, or person acting on behalf of said individual, candidate, or political committee, whether through the device of tickets, advertisements, or otherwise, for fundraising activities, including testimonials, held on behalf of said individual, candidate or political committee, to the extent that the purchase price exceeds the actual cost of the goods sold or services rendered; (5) discount or rebate not available to other candidates for the same office and to the general public; and (6) forgiveness of indebtedness or payment of indebtedness by another person; but shall not

include the rendering of services by speakers, editors, writers, poll watchers, poll checkers or others, nor the payment by those rendering such services of such personal expenses as may be incidental thereto, nor the exercise of ordinary hospitality.

• • •

"Expenditure", any expenditure of money, or anything of value, by an individual, candidate, or political committee, or a person acting on behalf of said individual, candidate, or political committee, for the purpose of influencing the nomination or election of said individual or candidate, or of presidential and vice presidential electors, or for the purpose of promoting or opposing a charter change, referendum question, constitutional amendment, or other question submitted to the voters, and shall include: (1) any purchase, payment, distribution, loan, advance, deposit, or gift of money, or anything of value; and (2) any transfer of money or anything of value between political committees. (6 Mass. Gen. Laws Ann. 63 (Supp. 1977-1978))

• • •

§8 is set forth at pp. 3-4, supra.

§22

The treasurer of any corporation mentioned in sectior eight which has given, paid, expended or contributed, or promised to give, pay, expend or contribute any money or any valuable thing in order to influence or affect the vote on any question submitted to the voters which materially affects any of the property, business or assets of the corporation, shall file reports with the director setting forth the amount of value of every gift, payment, expenditure or contribution or promise to give, pay, expend or contribute, together with the date, purpose, and full name and address of the person to whom it was made.

Such reports shall be filed as follows:—

(1) the sixtieth day prior to the election; on or before (2) the fifth and twentieth day of each month complete as of the preceding first and fifteenth day of the month, until the election, and, thereafter; (3) the fifth day of each month until all declared liabilities have been discharged.

Any corporation violating any provision of this section shall be punished by a fine of not more than fifty thousand dollars and any officer, director or agent of the corporation violating any provision thereof or authorizing such violation, or any person who violates or in any way knowingly aids or abets the violation of any provision thereof, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both. (6 Mass. Gen. Laws Ann. 84 (Supp. 1977-1978))

Massachusetts General Laws Chapter 168

§5. *Branches; establishment; discontinuance*

After such notice and hearing as the commissioner may require and with his written permission and under such conditions as he may approve such corporation may establish and maintain one or more branch offices or depots (*a*) in the town wherein its main office is located, or (*b*) in other towns within the same county having no main office or branch office of a savings bank or in which, in the opinion of the commissioner, the public convenience and advantage would be served by the establishment of additional savings bank facilities. Every application to establish and maintain one or more such branch offices or depots shall be accompanied by payment of an investigation fee of five hundred dollars for each branch or depot applied for.

The offices and depots of any savings bank consolidated or merged under section seventy-two or all or substantially all of the assets and liabilities of which have been acquired and assumed by another savings bank under section seven-

ty-three, may be maintained as branch offices or depots, respectively, of such other savings bank, with the written permission of and under such conditions, if any, as may be approved by the commissioner, provided, that no such office or depot shall be so maintained unless the town in or merged under section seventy-two or all or substantially which it is situated is within the county wherein the main office of such other savings bank is located.

With the written consent of the commissioner a branch office or depot may be closed, or its location may be changed subject to the requirements and restrictions contained in the first paragraph of this section.

The restrictions hereinbefore contained in this section shall not apply to branch offices and depots established on or before November first, nineteen hundred and fifty-five.

Any of the usual business transactions by such corporation at its main office may be transacted at a branch office. The business at a depot shall be transacted only on such days as may be designated by the board of investment and shall be limited to the receipt of deposits and the collection of moneys due or payable to the corporation, and such business shall be subject to such other conditions, if any, as may be prescribed by the commissioner.

Amended by St. 1972, c. 684, §102; St. 1973, c. 1149, §§7, 8. (27 Mass. Gen. Laws Ann. 27 (Supp. 1977-1978))

Massachusetts General Laws Chapter 170

§12. *Locations; main office and branches or depots; change; closing*

Such corporation shall carry on its principal business at its main banking office, which shall not be changed except with the approval of the commissioner. The corporation, after such notice and hearing as the commissioner may require and with his written permission and under such regulations as he may approve may establish and maintain one or more depots where moneys due the bank may be

collected by the treasurer or other persons duly empowered by the directors, upon such days as may be designated by vote of the board of directors; or may establish and maintain one or more branch offices (*a*) in the town wherein its main office is located, or (*b*) in other towns within the same county having no main office or branch office of a co-operative bank or in which in the opinion of the commissioner, the public convenience and advantage would be served by the establishment of additional co-operative bank facilities. Every application to establish and maintain one or more such depots or branch offices shall be accompanied by payment of an investigation fee of five hundred dollars for each depot or branch office applied for. Such corporation, upon the vote of two thirds of the members present at a meeting called for that purpose and with the approval of the board of bank incorporation, may change the location of its main office to another town within the commonwealth by appropriate amendment of its agreement of association, a copy of which shall be filed forthwith with the state secretary. With the written consent of the commissioner, a branch office or depot may be closed, or the location thereof may be changed subject to the requirements and restrictions contained in this paragraph for the establishment of such branch or depot.

The offices of any co-operative bank consolidated or merged under section forty-eight or all or substantially all of the assets and liabilities of which have been acquired under section forty-seven may be maintained as branch offices of such other co-operative bank, with the written permission of and under such conditions, if any, as may be approved by the commissioner; provided, that no such office shall be so maintained unless the town in which it is situated is within the county wherein the main office of such other co-operative bank is located. (27 Mass. Gen. Laws Ann. 77 (Supp. 1977-1978))

Massachusetts General Laws Chapter 172

§11. *Branches; establishment; main office; change of location*

(*a*) After such notice and hearing as the board may prescribe, a trust company may, with the approval of the board, establish and operate one or more branch offices in the city or town where its principal office is located, or in any other city or town in the same county having no commercial banking facilities or having banking facilities which, in the opinion of the board, are inadequate for the public convenience. All petitions for the establishment of a branch office shall state therein the specific area, location or street address, if available, where such proposed branch is to be located. All such petitions shall be accompanied by payment of an investigation fee of five hundred dollars for each branch office applied for. A branch office so authorized shall be established within one year of the board's approval thereof, except that the board may extend the time in which such branch office may be established, without further notice or hearing unless the board shall order it. If the board refuses to grant a petition for the establishment of a branch office, no further action may be taken by the petitioner in relation to such branch office during the year following the date of such refusal except with the approval of the board, but the petitioner may as of right renew his petition to establish such branch office after the expiration of one year from the date of such refusal. (27 Mass. Gen. Laws Ann. 146 (Supp. 1977-1978))

Massachusetts Stat. 1907, c. 576, § 22

SECTION 22. No insurance company or association, including fraternal beneficiary associations, doing business in this commonwealth, shall, directly or indirectly, pay or use or offer, consent or agree to pay or use any money or property for or in aid of any political party, committee or organization, or for or in aid of any corporation, joint,

stock or other association organized or maintained for political purposes, or for or in aid of any candidate for political office, or for nomination for such office, or for any political purpose whatsoever, or for the reimbursement or indemnification of any person for money or property so used. Any officer, director, stockholder, attorney or agent of any corporation or association which violates any of the provisions of this section who participates in, aids, abets or advises or consents to any such violation, and any person who solicits or knowingly receives any money or property in violation of this section, shall be guilty of a misdemeanor, and be punished by imprisonment for not more than one year and by fine of not more than one thousand dollars; and any officer aiding or abetting in any contribution made in violation of this section shall be liable to the company or association for the amount so contributed.

Massachusetts Stat. 1938, c. 75

Section seven of chapter fifty-five of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by inserting after the word "of" the first time it appears in the twenty-second line the following: —, or any matter or thing affecting, — so as to read as follows: — *Section 7.* No corporation carrying on the business of a bank, trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, or any company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, no business corporation incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation

mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing in order to aid, promote or prevent the nomination or election of any person to public office, or to aid, promote or antagonize the interests of any political party, or to influence or affect the vote on any question submitted to the voters. No person or persons, no political committee, and no person acting under the authority of a political committee, or in its behalf, shall solicit or receive from such corporation or such holders of stock any such gift, payment, expenditure, contribution or promise to give, pay, expend, or contribute; except that such a corporation, or such trustee or trustees, may in good faith publish or circulate paid matter when, under a question submitted to the voters, the taking, purchasing or acquiring of, or any matter or thing affecting, any of the property, business or assets of the corporation is involved, provided that the name of the corporation appears therein in the nature of a signature, and that, if inserted as reading matter, such matter is preceded or followed by the word "Advertisement", in the manner required by section thirty-three.

Massachusetts Stat. 1943, c. 273, § 1

SECTION 1. Chapter fifty-five of the General Laws is hereby amended by striking out section seven, as amended by chapter seventy-five of the acts of nineteen hundred and thirty-eight, and inserting in place thereof the following section: — *Section 7.* No corporation carrying on the business of a bank, trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trus-

tee or trustees owning or holding the majority of the stock of such a corporation, no business corporation incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No person or persons, no political committee, and no person acting under the authority of a political committee, or in its behalf, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay, expend or contribute for any such purpose.

MISCELLANEOUS

Internal Revenue Code of 1954, § 856

(a) *In general.*—For purposes of this subtitle, the term "real estate investment trust" means an unincorporated trust or an unincorporated association—

(1) which is managed by one of more trustees;
(2) the beneficial ownership of which is evidenced by transferable shares, or by transferable certificates of beneficial interest;
(3) which (but for the provisions of this part) would be taxable as a domestic corporation;
(4) which does not hold any property (other than foreclosure property, as defined in subsection (e)) primarily for sale to customers in the ordinary course of its trade or business;
(5) the beneficial ownership of which is held by 100 or more persons;
(6) which would not be a personal holding company (as defined in section 542) if all of its adjusted ordinary gross income (as defined in section 543 (b)(2)) constituted personal holding company income (as defined in section 543); and
(7) which meets the requirements of subsection (c).

In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION,
AND
WYMAN-GORDON COMPANY,
APPELLANTS,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

Brief for the Appellee

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THE FIRST NATIONAL BANK OF BOSTON,
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ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

Brief for the Appellee

Preliminary Statement

In accordance with the provisions of Rule 40(3) and except as noted in this preliminary statement, the Attorney General of the Commonwealth of Massachusetts accepts the Appellants' reference to opinions below, statement of jurisdiction, reference to the statute involved, statement of issues

presented and statement of the case. The Attorney General states, however, that the jurisdiction of this Court has been improperly invoked (a) because the case has become moot on appeal and (b) because the Appellants seek review of certain questions of state and federal law not properly before this Court on appeal. More specifically, the Attorney General asserts that questions pertaining to the vagueness of the first sentence of Mass. Gen. Laws c. 55, § 8, may not be raised on appeal.

For the convenience of the court, Appellee utilizes the same form of citation to the record as the Appellants. Citations to the Appendix to the Jurisdictional Statement appear as "J.S. App. ____" and citations to the Appendix simply as "App. ____".

Summary of Argument

I.

Appellee's first argument is jurisdictional in nature. The particular controversy between the parties to this appeal expired when the 1976 general election passed and the Appellants had not contributed money to oppose the graduated income tax question. The case became moot at that time, unless it is "capable of repetition, yet evading review." This appeal is not within the narrow range of cases which trigger that exception to the doctrine of mootness because (a) if the issues presented do again recur, it will be in an entirely different context permitting review on a concrete factual record, and (b) the time frame during which the statutory proscription against corporate campaign contributions actually operated was not too short to permit

adequate review. Delay in bringing this case before this Court is a function of the trial strategy of the Appellants and not a consequence of the operation of natural or man-made laws. Appellants cannot remove themselves from the operation of Article III of the United States Constitution merely because that strategy backfired.

II.

Corporations not in the business of communications or speech do not have First Amendment rights. First Amendment rights, encompassing the freedom of unfettered thought, opinion and speech, are peculiarly personal in nature. This Court has repeatedly found that corporations, as artificial entities, do not enjoy other peculiarly personal rights guaranteed to their owners and managers by other provisions of the Constitution. Only corporations in communications or speech-related businesses have been found to have First Amendment rights; and, in these cases, the fact that the party was a corporation was incidental to the questions before the Court.

As the court below found, the "right to hear" is not involved in this case, and unlike a ban on advertising, Mass. Gen. Laws c. 55, § 8, does not deprive the public from receiving any information.

III.

Even if, *arguendo*, corporations have First Amendment rights, those rights are limited to issues materially affecting the corporation's business, profits or assets. Appellants' First Amendment claims stem from the due process of law

clause of the Fourteenth Amendment. While the due process clause may protect the property interests of a corporation, the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons.

A corporation's powers, purposes and property interests are determined by the State. A corporation's property interests are necessarily limited by its corporate charter. Having voluntarily accepted the benefits that go with the corporate form, corporations must also accept the restrictions placed on their purposes and the use of their funds largely accumulated because of the privileges granted by the State.

Appellants claim that at a minimum the First Amendment should be held to protect corporate speech where corporations "believe" their material interests to be affected. However, a balancing of interests, and not a speaker's belief, determines whether speech is protected by the First Amendment.

IV.

Even if, *arguendo*, corporations have First Amendment rights which are co-extensive with those of natural persons, Mass. Gen. Laws c. 55, § 8, is still constitutional. Because Mass. Gen. Laws c. 55, § 8, permits corporate managers and even corporations to express their political views in many different forms and forums, the statute has only an incidental effect on corporate and corporate managers' speech.

On the other hand, the statute furthers several significant state interests. First, by freeing elections from possible corporate interference, the statute furthers the state's interest in sustaining an active, alert role for the individual

citizen in the election process. This interest is particularly significant in initiatives and referenda, which are the purest form of democracy, introduced as a method for giving individual citizens the last say on particular legislative matters. Second, by preventing corporations from using their influence gained through governmental privileges, the statute furthers the state's interest in sustaining the individual citizen's confidence in government. Third, by prohibiting corporations from spending stockholders' money for political purposes, the statute furthers the state's interest in preventing stockholders from being compelled to furnish contributions for the propagation of political opinions in which they do not believe. Other schemes to protect shareholder rights, such as requiring a majority vote of shareholders for political expenditures or notification to the shareholders, would not effectively protect minority interests that would still be disregarded.

V.

The provision of Mass. Gen. Laws c. 55, § 8, which was applicable to the Appellants' proposed course of action is not vague and contains no evidentiary presumptions. The statute creates two separate but related crimes. The first is general in nature and prohibits certain corporations from making contributions or expenditures to oppose ballot questions which will not "materially affect" their business, property or assets. The second crime is specific in nature and prevents corporate contributions to oppose ballot questions dealing solely with the taxation of individuals. The Appellants brought this litigation because they wanted to follow the course of conduct interdicted by the second crime, but material effect is not an element of that offense.

Hence questions as to the vagueness of the phrase "materially affecting" or the existence of an evidentiary presumption alleviating the Commonwealth's assumed burden of proving a material effect are simply not presented. In any event, the legislative and judicial history of the statute indicates, and the Appellants concede, that the second crime was "tailor-made" to prohibit corporate campaign contributions to oppose a graduated income tax amendment. There is no doubt that the statute afforded Appellants fair notice that such contributions were proscribed.

VI.

By prohibiting contributions by business corporations, but not other artificial entities organized for business purposes, Mass. Gen. Laws c. 55, § 8, does not deny business corporations equal protection of the laws. The classification implicit in the statutory scheme is based on economic differences which make it more likely that corporate contributions, as opposed to contributions by other artificial entities, will undermine the role of the individual voter in the initiative and referendum process and will result in diminution of the political rights of individual stockholders. These factors justify restrictions on business corporations that may not legitimately be applied to other organizations. Even if restrictions could be constitutionally imposed on these other organizations, however, the equal protection clause does not mandate the conclusion that the Commonwealth must proscribe all contributions by unnatural persons or none at all.

Argument

I. The Issues Presented Are Non-Justiciable Because This Case Has Become Moot On Appeal.

The specific dispute which spawned this appeal is over. In November of 1976 the voters of the Commonwealth once again rejected a proposed graduated income tax amendment to the Massachusetts Constitution. J.S. App. 4, n. 6. The Appellants, all Massachusetts corporations which had expressed a desire to make political contributions or expenditures to oppose the amendment and who unsuccessfully appeared before the Supreme Judicial Court to challenge the Commonwealth's right to restrict their activities, refrained from contributing or expending corporate funds to express their opposition. Whatever the outcome of this appeal, there can be no future enforcement efforts as a result of the facts underlying this case because there has been no violation of Mass. Gen. Laws c. 55, § 8. Under these circumstances the case has become moot on appeal.

The rule against deciding moot cases is not discretionary; it is a rule of constitutional dimension having its roots in Article III of the United States Constitution. *See, e.g., Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 (1964). To the extent that the rule "defines constitutionally minimal conditions for the invocation of federal judicial power, its meaning and scope . . . must be derived from the fundamental policies informing the 'cases or controversies' limitation imposed by Art. III." *Franks* v. *Bowman Transp. Co., Inc.*, 424 U.S. 747, 754 (1976). The "cases and controversies" limitation is a jurisdictional prerequisite to the exercise of federal judicial power and requires that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel* v.

Thompson, 415 U.S. 452, 459, n. 10 (1974), citing *Roe* v. *Wade*, 410 U.S. 113, 125 (1973). A "rigid insistence" on this requirement is particularly important here, because a major constitutional issue is presented on a less than optimal record. *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Ordinarily the current controversy requirement is not met, and a case becomes moot on appeal, whenever the party claiming to be aggrieved ceases to have a personal stake in its outcome. *See*, *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974). The Appellants in this case seek to avoid the consequences of mootness by invoking the "capable of repetition, yet evading review" exception to the doctrine. *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). The exception is of no avail to the Appellants.

The instant case was not commenced as a class action, App. 3-9, a factor which "significantly affects the mootness determination." *Sosna* v. *Iowa*, 419 U.S. 393, 399 (1975). In the absence of a class action, the "capable of repetition, yet evading review" exception was limited by the decision in *Sosna* to situations "where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). Neither of these elements is present in this case.

Whether or not the same controversy will recur is a matter of sheer speculation.[1] The Appellants argue with

[1]This Court is asked to speculate in another significant regard. The judgment of the Supreme Judicial Court effectively constituted a refusal to preclude institution of criminal proceedings against corporations for making contributions violative of Mass. Gen. Laws c. 55, § 8. Appellants ask this Court to conclude that if such proceedings had been commenced, they would have operated to deprive corporations of asserted constitutional rights. This is a matter of conjecture which does not present a substantial federal question. *See*, *Abrams* v. *Van Schaick*, 293 U.S. 188 (1934).

assurance that the issues will arise again because, in their view, a graduated income tax amendment will inevitably again be placed on the Massachusetts ballot. In the past, graduated income tax amendments in one form or another have repeatedly been placed before the voters of the Commonwealth, who have just as consistently rejected them. Appellants' Brief, 20, n. 5. The 1976 election marked the first time, however, that corporate contributions to oppose the amendment had been effectively foreclosed. *See*, *First National Bank* v. *Attorney General*, 362 Mass. 570, 290 N.E. 2d 526 (1972) (hereinafter referred to as *FNBI*); *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 183 N.E. 2d 871 (1962). In light of the defeat of the amendment at this last election, it is doubtful whether it will again be placed on the ballot. In any event, this is not the kind of election issue which will necessarily recur at regular intervals, as questions pertaining to nomination of candidates or eligibility to vote will. On the contrary, an affirmative vote of two consecutive sessions of the General Court must precede placing the amendment on the ballot. While past history may be instructive in this regard, it simply cannot be conclusively presumed that the legislature will take that action.

Moreover, if a similar controversy does arise between these parties in the future, it will presumably be litigated in a different manner.[2]

[2]In fact the history on which Appellants rely for the assertion that the same controversy will recur belies their conclusion. The history of the graduated income tax amendments is evolutionary. Both the text of the

Given the holding of the lower court, corporations would stand little chance of successfully instituting an action for declaratory judgment if they submitted their case on an agreed statement of facts and merely argued from those facts. Realistically, the issues presented by this appeal can only recur either by way of criminal prosecution or after a civil trial to determine the merits of the corporate claim. Appellants' Brief, 32. Thus, while the issues presented may be capable of repetition, presumably they will reappear before this Court not in the "same action" as that term is used in *Weinstein* v. *Bradford*, *supra*, but in an entirely different context and on a more concrete factual record.

Assuming, *arguendo*, that there is a reasonable probability that the issues presented will arise again between the parties to this appeal, this matter still does not fall within the narrow range of cases which are capable of repetition, yet evading review. That exception to the mootness doctrine is triggered only where the action, order or statute challenged operated during a time period so short that it was virtually impossible fully to litigate its validity. Appellants seek to have this Court determine the question of mootness not on the basis of what actually happened in the underlying litigation, but on the basis of what may happen in similar cases brought in years to come. Appellants' Brief, 22-23. They argue not that the proscription against corporations operated in this case in a time frame too short for complete adjudication, but that in the future case backlogs in the trial courts of the Commonwealth may effectively preclude appellate review. Their prospective examina-

amendments submitted to the voters and the form of corporate challenges to a restriction on their contributions have constantly changed. *See*, *FNBI*; *Lustwerk* v. *Lytron, Inc.*, *supra*. If the issues are litigated again, history suggests it will not be in the same fashion.

tion of this element of the "capable of repetition, yet evading review" exception is totally inconsistent with the cases or controversies requirement of Article III which informs mootness analysis. *Franks* v. *Bowman Transp. Co., Inc., supra*. Unless this Court is prepared to issue an advisory opinion on supposed facts, inquiry into the time frame available for review must be confined to an examination of the actual course of this litigation.

It is not surprising that Appellants argue from hypothetical facts, because it was their actual treatment of this case which made appellate review impossible. They could have brought suit to challenge Mass. Gen. Laws c. 55, § 8, as early as May 7, 1975. On that date the Massachusetts General Court took the final legislative action necessary to place the graduated income tax amendment on the November 1976 ballot. I Journal of the Senate, 1409-1412 (1975). At that time the 1975 amendment to Mass. Gen. Laws c. 55, § 8, was fully effective.[3] As the Supreme Judicial Court noted in its decision, the Appellants had complete control over the commencement of their litigation and could have sought declaratory relief in the spring of 1975, nearly eighteen months prior to the election. App. 15, n. 15. Instead, they waited nearly a year and filed a complaint on April 9, 1976. App. 1, 2. By choosing to file at that late date, Appellants not only prevented a full trial proceeding but precluded any meaningful opportunity to seek review by this Court. If the suit had begun in May of 1975 and proceeded through all stages at exactly the same pace as this litigation, it could have been submitted to this Court while the controversy was a current one. Thus the limited period for review in this case is a direct consequence of the Appellants' trial strategy and is not a result of the operation

[3]St. 1975, c. 151, became effective on April 28, 1975.

of natural or man-made laws. *Contrast*, *Roe* v. *Wade*, 410 U.S. 113 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972).

Appellants should not be extricated from their plight simply by characterizing this as an election case. This Court has not established a unique rule for election matters. Certainly the "capable of repetition, yet evading review" exception has been invoked in the past to assume jurisdiction after the relevant election has passed,[4] but the Court has also sustained mootness claims in such cases.[5] The Court has rejected a talismanic invocation of the election process with its obvious time constraints and has instead analyzed each case on its own merits.

Finally, this is not a typical election case presenting questions about the constitutionality of nominating procedures or voter qualifications which will necessarily recur every two or four years and which implicate the ability of classes of citizens to participate in a democratic election process. The public policy arguments which militate in favor of deciding such cases are totally lacking here, where the difficulty of obtaining appellate review was caused by the Appellants' own delay in bringing suit and where a ruling by this Court will have no direct impact on the elective process. Based on the foregoing analysis, this Court should dismiss this appeal for lack of jurisdiction.

[4] *American Party* v. *White*, 415 U.S. 767 (1974); *Storer* v. *Brown*, 415 U.S. 724 (1974); *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973); *Dunn* v. *Blumstein*, *supra*; *Moore* v. *Ogilvie*, 394 U.S. 814 (1969).

[5] *Brockington* v. *Rhodes*, 396 U.S. 41 (1969); *Golden* v. *Zwickler*, 394 U.S. 103 (1969).

II. Corporations Not In The Business Of Communications Or Speech Do Not Have First Amendment Rights.

Appellants contend that Mass. Gen. Laws c. 55, § 8, is unconstitutional as a violation of freedom of expression. However, Appellants, as corporations not in the business of communications or speech, do not have First Amendment rights.

Corporations are artificial entities. They are legal fictions created as a convenient way to do business which exist for the benefit of the entire economy. As this Court noted in *Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819):

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.

One of the most important characteristics of a corporation is that it divorces its human owners and managers from the corporate entity.[6] Corporations cannot have opinions. In fact, because of the dispersion of stock ownership and shareholder apathy, opinions purportedly expressed on

[6] Harry Henn in *The Law of Corporations* 110 (1970) lists the six major attributes of the modern corporation. At least four of these attributes [(1) the power to contract and to take, hold, and convey property in the corporate name; (2) the power to sue and to be sued in the corporate name; (3) perpetual succession; and (4) limited liability] can at least in part be attributed to the desire to keep the corporate entity separate from its human owners and managers.

behalf of a corporation tend to be the personal opinions of its management. Note, "Corporate Political Affairs Programs," 70 Yale L.J. 821, 833 (1961). Mass. Gen. Laws c. 55, § 8, does not prohibit corporate managers from expressing their opinions. Rather, it prohibits corporate managers from using the corporate treasury to express their personal views on election issues not materially affecting the corporation.

This Court has never decided whether corporations enjoy First Amendment rights entitling them to express their opinions on electoral issues. However, this Court has repeatedly found that corporations do not enjoy other peculiarly personal rights guaranteed to their owners and managers by other constitutional provisions. The logic of these cases is totally applicable to the instant case.

In *Bank of Augusta* v. *Earle*, 38 U.S. (13 Peters) 519, 536 (1839), this Court declared that corporations did not enjoy the privileges and immunities of citizens. The Court noted that a corporation is an "artificial being created by the charter," and "[t]he only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state." 38 U.S. at 587. In *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 177 (1868), this Court observed that the term "citizen" as found in the privileges and immunities clause "applies only to natural persons . . ., owing allegiance to the State." *See also*, *Blake* v. *McClung*, 172 U.S. 239 (1898); *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Assoc.*, 276 U.S. 71 (1928); *Hemphill* v. *Orloff*, 277 U.S. 537 (1928); and *Asbury Hospital* v. *Cass County*, 326 U.S. 207 (1945), for later cases declaring that corporations do not enjoy the rights of citizens guaranteed by the privileges and immunities clause.

This Court has also held that corporations cannot claim the Fifth Amendment right against self-incrimination,[7] equality with individuals in the enjoyment of a right to privacy,[8] or even freedom of association.[9] In each instance the Court has differentiated between rights belonging to individuals and those pertaining to corporations, consistently refusing to permit corporations to exercise the personal rights guaranteed to their management. In the context of corporate freedom of association claims in sit-in cases, Justice Douglas asked:

> So far as the corporate owner is concerned, what constitutional right is vindicated? It is said that ownership of property carries the right to use it in association with such people as the owner chooses. The corporate owners in these cases — the stockholders — are unidentified members of the public at large, who probably never saw these petitioners, who may never have frequented these restaurants. What personal rights of theirs would be vindicated by affirmance? . . .
>
> Who, in this situation, is the corporation? Whose racial prejudices are reflected in "its" decision to refuse service to Negroes? The racial prejudices of the manager? Of the stockholders? Of the board of directors? . . .

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[7] *United States* v. *White*, 322 U.S. 694, 699 (1944); *Wilson* v. *United States*, 221 U.S. 361, 382-86 (1911).

[8] *California Bankers Assoc.* v. *Schultz*, 416 U.S. 21 (1974); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 651 (1950).

[9] *Bell* v. *Maryland*, 378 U.S. 226 (1964).

> [H]ow is a "personal" right infringed when a corporate chain store, for example, is forced to open its lunch counters to people of all races? How can that so-called right be elevated to a constitutional level? How is that corporate right more "personal" than the right against self-incrimination? *Bell* v. *Maryland*, 378 U.S. 226, 261-263 (1964) (Douglas, J., concurring).

In at least two lower court cases, courts have concluded that corporations do not enjoy the right to freedom of speech or association. *Joint Anti-Fascist Refuge Committee* v. *Clark*, 177 F. 2d 79, 83 (D.C. Cir. 1949), rev'd on other grounds, 341 U.S. 123 (1951); *Hallmark Productions, Inc.* v. *Mosley*, 190 F. 2d 904, 909 (8th Cir. 1951).

Appellants in their Brief, at 37, 39, make no attempt to distinguish the cases cited in this section of Appellee's Brief, or to explain why the right to freedom of speech is not a personal right. Rather, they have cited cases which purportedly stand for the proposition that corporations do enjoy First Amendment rights. None of the cases cited in Appellants' Brief make any such flat assertion.

All but two of the cases cited by Appellants involve corporations or individuals involved in the communications business.[10] They do not declare that corporations *per se*

[10] *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), involved a license fee imposed directly on newspapers. In *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952), and *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684 (1959), the corporations were engaged in the business of distributing motion pictures. A newspaper was the defendant corporation in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). *Pennekamp* v. *Florida*, 328 U.S. 331 (1946), was a contempt action against a newspaper publisher and editor and did not even directly involve a corporation. *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), was a libel and right to privacy action against a national magazine.

have First Amendment rights, but merely recognize that natural persons retain their First Amendment rights even though they publish or distribute their views under corporate auspices. None of these cases raised the question of the propriety of corporate managers spending stockholder funds for purposes unrelated to the corporation's charter. Instead, in all of these cases, the fact that a party was a corporation was incidental to the questions before the court.

Appellants cite only two cases involving corporations not in the communications business to support the proposition that corporations *per se* have First Amendment rights. Appellants' Brief, 37. In *NAACP* v. *Button*, 371 U.S. 415 (1963), this Court declared Virginia's ban on certain forms of solicitation of legal business unconstitutional. The Court did not find that all corporations have First Amendment rights, but, rather, quite carefully stated that the NAACP, although a corporation, could assert First Amendment rights on its own behalf expressly because "it is directly engaged in those activities [protected by the First and Fourteenth Amendments]." 371 U.S. at 428.

Finally, Appellants have cited the case of *Linmark Associates, Inc.* v. *Township of Willingboro*, 45 U.S.L.W. 4441 (May 2, 1977), where this Court struck down a ban on placing "For Sale" signs in front of people's homes. However, in *Linmark* there was no discussion of a corporation's right to bring the action, and, in fact, the case involved a non-corporate as well as a corporate petitioner. Of more importance, this Court did not find that corporations have First Amendment rights, but, rather, that the Township's ban affected the interest of other members of the community in receiving the information. Despite Appellants' repeated attempts to characterize this case as one

involving "the right to hear," this issue simply is not involved given the facts and parties in this case.

Appellants correctly note that "[t]he court below never once alluded to the right of the people to hear, although this point was stressed throughout plaintiff's presentation . . ." Appellants' Brief, 43. The court below realized that "the right to hear" is not involved in this case. The public's interest in receiving information is one of the important interests embodied in the First Amendment. *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969). This does not mean, however, that a party with no First Amendment rights can invoke these interests. One of the reasons for granting parties First Amendment rights was so that others could hear what they had to say. However, if it should be determined that the corporations in this case do not have the First Amendment rights they are seeking, it does not matter that one of the interests that would be embodied in their rights (if they had them) would be the interests of the other people to hear what they have to say. Furthermore, unlike a ban on advertising, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), or a ban on "For Sale" signs, *Linmark Associates, Inc.* v. *Township of Willingboro*, 45 U.S.L.W. 4441 (May 2, 1977), which effectively close off the public's ability to obtain certain information, Mass. Gen. Laws c. 55, § 8, effects no such ban. Instead, the law simply forbids corporate managers from spending corporate money to express their personal views. Because the corporate managers are free to express their opinions in their private capacity, the public is not deprived of any information.[11]

[11]If Appellants' "right to hear" argument is construed to challenge Mass. Gen. Laws c. 55, § 8, as unconstitutional as applied, Appellants have failed to meet their burden of showing that the statute deprives anyone of hearing their views. It is important to note that even with corporations prohibited from making expenditures or contributions on the 1976 referendum question which would have legalized a graduated income tax, the proposed referendum was nevertheless defeated, indicating that Appellants' views obviously managed to reach the public. J.S. App. 4, n. 6.

See Section IV of this Brief, at 31, for a discussion of further ways that even corporations have for making their opinions known.

III. Even If, Arguendo, Corporations Have First Amendment Rights, Those Rights Are Limited To Issues Materially Affecting The Corporation's Business, Profits Or Assets.

The court below concluded that even though in their opinion corporations possess certain rights of speech and expression, those rights are limited to issues materially affecting the corporation's business, profits or assets.[12] Specifically, noting that Appellants' claims stem only from the equal protection and due process of law clauses of the Fourteenth Amendment, J.S. App. 12; Appellants' Brief, 36, the court below declared:

> It seems clear to us that a corporation does not have the same First Amendment rights to free speech as those of a natural person, but, whether its rights are designated "liberty" rights or "property" rights, a corporation's property and business interests are

[12]Such a ruling offers another way for reconciling the restrictions on corporate speech involved in this case with all of the cases cited by Appellants involving commercial speech. In all commercial speech cases, the corporation(s) (if any) involved necessarily have a direct financial interest in the speech being contested.

entitled to Fourteenth Amendment protection. *Pierce* v. *Society of Sisters, supra.* See *Bowe* v. *Secretary of the Commonwealth*, 320 Mass. 230, 251 (1946). It is also clear that, as an incident of such protection, corporations possess certain rights of speech and expression under the First Amendment.

Thus, we hold today that only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public. This limitation is identical to the legislative command in the first sentence of G.L. c. 55, § 8. Put in another way, the Legislature has clearly identified in the challenged statute the parameters of corporate free speech.[13] (Footnotes omitted.)

Appellee contends that corporations not in the business of communications or speech do not possess any rights of freedom of speech or expression. However, if this argument were rejected, this Court's decisions involving the due process clause make it clear that any such First Amendment rights would be limited to issues materially affecting the corporation's business, profits or assets. Since the court below found that Appellants failed to demonstrate a material effect, they cannot lay claim even to these limited First Amendment rights.

[13] Significantly, as noted by the court below, under this view of the First Amendment, the restrictions this Court placed on campaigning expenditures in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), are not relevant to a decision in this case. J.S. App. 10, n. 11.

In *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1939), the Supreme Court held that a corporation could not maintain a suit to enjoin interference with its freedom of speech and of assembly. As Mr. Justice Stone said in his concurring opinion:

> As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons. *Northwestern Nat. Life Insurance Co.* v. *Riggs*, 203 U.S. 243, 255 (1906); *Western Turf Ass'n* v. *Greenberg*, 204 U.S. 359, 363 (1970). *Id.* at 527.[14]

In *Pierce* v. *Society of Sisters of Holy Name*, 268 U.S. 510 (1925), this Court specifically recognized that those rights which corporations do enjoy under the Fourteenth Amendment are related to the direct business and property interests of the corporation. The Court stated:

> Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. [Citations.] But they have business and property for which they claim protection.

[14] Another view of the Fourteenth Amendment also relevant to this case is found in Justice Rehnquist's separate opinion in *Buckley* v. *Valeo*, 424 U.S. 1, 291 (1976), in which Justice Rehnquist states that in his opinion "not all of the strictures which the First Amendment imposes upon Congress are carried over against the States by the Fourteenth Amendment, but rather that it is only the 'general principle' of free speech . . . that the latter incorporates." (Citations omitted.)

> These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. [Citations.] *Id.* at 535.

In the more recent case of *D.D.B. Realty Corp.* v. *Merrill*, 232 F. Supp. 629 (D. Vt. 1964), relying on the *Northwestern Nat. Life Insurance Co.* line of cases, the District Court of Vermont summed up:

> Insofar as the Due Process clause applies to "property", a corporation is considered a "person". Insofar as the Due Process clause applies to "liberty" and "life", a corporation is without standing to sue for the loss of these two elements. . . . On the other hand, there are cases where the artificial body of a plaintiff corporation has been allowed standing to sue for these subjective elements possessed by human beings, although such allowance was often over a vigorous dissent. . . . It is perhaps worthy to note that in many of these latter cases, the "liberty" or "life" claimed to have been impinged is one which an inanimate corporation could possess and does not affect human emotions or sensitivities. *Id.* at 637.

See also, Mexican-American Federation — Washington State v. *Naff*, 299 F. Supp. 587 (E. D. Wash. 1969) (denying a corporation standing to challenge the state's constitutional provision regarding literacy in the English language as a voter qualification, even though the express

purpose of the corporation was to represent, promote and achieve the economic, social and cultural interests of all Mexican-American people in the State of Washington).

The *Northwestern Nat. Life Insurance Co.* line of cases makes it clear that the due process rights to which a corporation is entitled are limited to those areas materially affecting the corporation's business, profits or assets. Another line of cases leading to the same conclusion involves the right of the state to impose limitations on corporations. A corporation is a creature of the State. As this Court stated in *Prudential Insurance Co. of America* v. *Cheek*, 259 U.S. 530 (1922):

> [T]he right to conduct business in the form of a corporation . . . is not a natural or fundamental right. It is a creature of the law; and a State in authorizing its own corporations or those of other States to carry on business . . . may qualify the privilege by imposing such conditions and duties as reasonably may be deemed expedient in order that the corporation's activities may not operate to the detriment of the rights of others with whom it may come in contact. *Id.* at 536.

As a creature of the State, the powers of a corporation are simply such as state statutes confer, and the enumeration of them implies exclusion of all others. *Thomas* v. *Railroad Co.*, 101 U.S. 71 (1879); *Pennsylvania Railroad Co.* v. *St. Louis, etc., Railroad Co.*, 118 U.S. 290 (1886). A corporation's specific purposes are set forth in its charter which is created pursuant to the requirements of state law. *Dartmouth College* v. *Woodward, supra*, at 636.

Like everyone else, a corporation's property interests "are not created by the Constitution. Rather, they are created

and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). In sum, a corporation's powers, purposes and property interests are defined by the State. Thus, the due process property rights of corporations must be limited to protecting those property interests determined by the State to be consistent with the corporation's powers and purposes. By definition, a corporation cannot have property interests going beyond its purposes; in other words, a corporation's due process interests must necessarily be limited to matters materially affecting its business, profits or assets.[15] This is the exact conclusion reached by the Michigan Supreme Court in the case of *People* v. *Gansley*, 158 N.W. 195 (Mich. 1916), which examined whether restrictions on corporate expenditures in election campaigns violated the corporation's due process rights. The court reasoned:

> The expenditure of the money of the Lansing Brewing Company for election purposes cannot be deemed to be a property right within the meaning of the Fourteenth Amendment. Such corporations have no right to participate in the elective franchise. We are not dealing with a measure that deprives a corporation of any of its property, or that impairs the value of that property.

[15]It is interesting to note that in the context of proxy statements corporations have argued that matters of a general political, social or economic nature do not significantly affect their business. In its very first opinion discussing proper subjects for shareholder action under S.E.C. Reg. § 240.14a-8, the Securities and Exchange Commission declared that a corporation need not place on its proxy statement a shareholder proposal calling for elimination of taxation on dividends, because matters of a "general political, social or economic nature" were not a "proper subject" for shareholder action. '45-'47 CCH Dec. ¶75,502 (Jan. 3, 1945).

Neither are we dealing with the deprivation of any right or privilege granted by the laws under which such corporation was created and exists, as was the fact in the cases cited, and relied upon by counsel for respondent. . . .

We agree with counsel for the people wherein they say:

> "If the respondent in this case, or the stockholders and officers of the Lansing Brewing Company desired, as individuals, to contribute to the campaign fund, it was their privilege so to do, subject to the regulations imposed by the statute. This artificial person, however, that was created for the purpose of manufacturing beer, has no such right; and it lies within the power of the Legislature of this state to say that its funds should not be used for such a purpose." *Id.* at 200, 201.

Appellants, having accepted the privilege of conducting business in the corporate form by voluntarily accepting the benefits that go with the corporate form, must also accept the restrictions placed on their purposes and the use of their funds largely accumulated because of the privileges granted by the State. In Massachusetts, all individuals forming corporations are subject to Mass. Gen. Laws c. 155, § 3, which provides that "[a]ll corporations organized under general laws shall be subject to such laws as may be hereafter passed affecting or altering their corporate rights or duties or dissolving them."

This Court repeatedly has upheld over First Amendment objections regulatory schemes which restrict corporate communication so long as they do not discriminate against communications media. *See, e.g., Associated Press* v. *National Labor Relations Board*, 301 U.S. 103 (1937);

Lincoln Federal Labor Union v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U.S. 469 (1941).

On several occasions, this Court has specifically noted that corporations, having accepted the privileges of corporate existence, cannot complain of the limitations necessarily accompanying the limited corporate purpose. In finding that corporations do not enjoy a right to privacy equal to an individual's, this Court just recently declared in *California Bankers Assoc.* v. *Schultz*, 416 U.S. 21, 65 (1974), quoting *United States* v. *Morton Salt Co.*, 338 U.S. 632, 651-52 (1950):

> "While they may and should have protection from unlawful demands made in the name of public investigation, *cf. Federal Trade Comm'n* v. *American Tobacco Co.*, 264 U.S. 298, corporations can claim no equality with individuals in the enjoyment of a right to privacy. . . . They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. . . . Favors from government often carry with them an enhanced measure of regulation. . . . Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." (Citations omitted.)

Similarly, this Court has declared:

> It would be intolerable that the Congress should endow an association with the right to conduct a public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection. It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions. *Fahey* v. *Mallonee*, 332 U.S. 245, 256 (1947).

In the election context, this Court declared just last year in *Buckley* v. *Valeo*, 424 U.S. 1, 57, n. 65 (1976), that even though expenditure limitations on candidates were unconstitutional when standing alone, "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." *See also*, *Arnett* v. *Kennedy*, 416 U.S. 134, 154 (1974), in which the plurality opinion declared OEO discharge procedures constitutional, noting that because the employee's property rights were defined in part by the statute's discharge procedures, the litigant "must take the bitter with the sweet."

Appellants, conceding for the sake of argument that corporations' constitutional rights might be limited to matters materially affecting their business, raise one additional argument as to why Mass. Gen. Laws c. 55, § 8, is still allegedly in violation of the First Amendment. Appel-

lants claim that at a minimum the First Amendment should be held to protect corporate speech where corporations "believe" their material interests to be affected. Appellants' Brief, 56.

However, the First Amendment has never been held to protect all speech which the speaker "believed" to be proper. Just recently, in the area of libel law, this Court declared in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), that even though a speaker *believed* in the truth of a statement asserted, if the statement was nevertheless negligently made, it was not protected by the First Amendment.

Specifically, Appellants seem to assert that to punish corporations for speech that they believe to materially affect their business shifts the burden of materiality onto them. Appellants' Brief, 33. This argument confuses the operation of the act with the procedural posture of this case, which was brought as a declaratory judgment. In order to succeed in this declaratory judgment action, Appellants, who sought below to have Mass. Gen. Laws c. 55, § 8, declared unconstitutional as to them even before it was applied, had the burden of showing that their proposed speech materially affects their businesses. However, in a criminal prosecution under the Act, Mass. Gen. Laws c. 55, § 8, does not shift any burdens of proof, but rather requires, as in any criminal proceeding, for the Commonwealth to prove beyond a reasonable doubt each and every element of the offense. Materiality is not an element of the crime of contributing to oppose a graduated income tax question; lack of materiality would instead be an affirmative defense. Nevertheless, to the extent that the corporations' belief raises a doubt as to materiality, the corporations would be found innocent. The court below correctly concluded:

> The plaintiffs further argue that all they need show is a "reasonable belief" that the proposed amendment would materially affect them. While such a belief is relevant to the question whether such an expenditure would be ultra vires, cf. *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 651 (1962), standing alone it is not relevant to the question presented herein. J.S. App. 15, n. 15.

IV. Even If, Arguendo, Corporations Have First Amendment Rights Which Are Co-Extensive With Those Of Natural Persons, Mass. Gen. Laws c. 55, § 8, Is Still Constitutional.

Even if this Court were to find that corporations have First Amendment rights which are co-extensive with those of natural persons, Mass. Gen. Laws c. 55, § 8, is still constitutional. Neither the right to associate nor the right to participate in political activities is absolute. *See, e.g.*, *C.S.C.* v. *Letter Carriers*, 413 U.S. 548, 567 (1973); *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972); *Bullock* v. *Carter*, 405 U.S. 134, 140-41 (1972); *Jenness* v. *Fortson*, 403 U.S. 431 (1971); *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968). Even a "'significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational rights.[16] *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976);

[16] Appellants have attempted to characterize this case as involving prior restraints, thus requiring an even stronger governmental interest to justify the statute. Appellants' Brief, 29-34. However, Mass. Gen.

Cousins v. *Wigoda*, 419 U.S. 477, 488 (1975). Specifically, as this Court stated in *Younger* v. *Harris*, 401 U.S. 37, 51 (1971):

> Where a statute does not directly abridge a free speech, but — while regulating a subject within the State's power — tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. (Citations omitted.)

In this case, Mass. Gen. Laws c. 55, § 8, has only an incidental effect on corporate and corporate managers' speech. Corporate managers can voluntarily speak independently of the corporation.[17] The court below noted that

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Laws c. 55, § 8, as a criminal statute which punishes individuals only after they have spoken, cannot be characterized as involving prior restraints. As this Court noted in *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), a system of prior restraints is to be *contrasted* with a system of criminal penalties:

> The presumption against prior restraints is heavier — and the degree of protection broader — than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. (Emphasis in opinion.) *Id.* at 558-559.

[17]Compare this with the situation in *Buckley*, where the Court declared unconstitutional the campaign expenditure limitations since they inhibited "actions voluntarily undertaken by citizens independently of a candidate's campaign." 424 U.S. at 37, 39-51.

there is no language in Mass. Gen. Laws c. 55, § 8, "which would preclude corporate officers, directors, stockholders or employees from expressing their views publicly on the merits of such a proposed referendum by participation in television or radio discussions, news conferences, statements issued to the press or through other similar means not involving contributions or expenditures of corporate funds." J.S. App. 17. In addition, the court below observed that a corporation could express its views on political proposals in "a trade journal, a house organ or a newspaper, published by a corporation." J.S. App. 16. In light of the many means still available to corporations and corporate managers to express their opinions on political issues, any attempt to characterize Mass. Gen. Laws c. 55, § 8, as a total prohibition on corporate involvement in campaigns, more stringent than the expenditure limitations involved in *Buckley*, must be rejected.[18]

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[18]Similarly, this Court apparently found it important in *C.S.C.* v. *Letter Carriers*, 413 U.S. at 556, that the "Hatch Act" did not prohibit public employees from participation in all public activities. The Court specifically noted that:

> . . . The Act did not interfere with a "wide range of public activities." . . . It was "only partisan political activity that is interdicted. . . . [Only] active participation in political management and political campaigns [is proscribed]. Expressions, public or private, on public affairs, personalties and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success." (Citations omitted.)

This Court in *Buckley* rejected Appellee's attempted reliance on *C.S.C.* This Court stated that:

> In upholding the Hatch Act's broad restrictions on the associational freedoms of federal employees, the Court repeatedly emphasized the statutory provision and corresponding regulation permitting an

A. *The State Has Substantial Interests In Preventing Corporations From Making Contributions Or Expenditures To Influence The Vote On Referendum And Initiative Issues.*

The Commonwealth has substantial interests in preventing corporations from making contributions or expenditures to influence the vote on referendum and initiative issues.[19]

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employee to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates." (Citations omitted.)

Buckley v. *Valeo*, 424 U.S. at 48, n. 54. For the very reasons that this Court found *C.S.C.* inapplicable to *Buckley*, this Court should find *C.S.C.* applicable to this case.

[19]Currently 31 states and the federal government have enacted statutes restricting contributions either by limiting them as to amount or restricting the source from which they are received. All of those jurisdictions, with the exception of the two noted by asterisk, have singled out corporations for special treatment:

Federal Corrupt Practices Act, 2 U.S.C. § 441(b);
Ala. Code Tit. 17, § 286 (1976);
Ariz. Rev. Stat. § 16-471(a) (1976);
Ark. Stat. Ann. § 3-1110 (Supp. 1975);
*Del. Code Tit. 15, § 8004(a) (Supp. 1974);
*Fla. Stat. Ann. § 106.08(1) (Supp. 1975);
Ind. Code Ann. § 3-4-3-3 (Supp. 1975);
Iowa Code Ann. § 56.29 (Supp. 1976);
Kan. Stat. § 25-1709 (1975);
Ky. Rev. Stat. §§ 121.025, 121.035 (Supp. 1976);
La. Rev. Stat. Ann. §§ 18:1482, 1483 (1976);
Me. Rev. Stat. Tit. 21, §§ 1395.2, 1395.3 (Supp. 1976);
Md. Ann. Code § 26-9(b) (Supp. 1976);
Mass. Gen. Laws Ann. c. 55, § 8 (Supp. 1976);
Minn. Stat. Ann. § 210A.34 (Supp. 1973);
Mo. Ann. Stat. § 130.020.5 (Supp. 1976);
Mont. Rev. Codes Ann. §§ 23-4795(1), 23-4744 (Supp. 1972);
N.H. Rev. Stat. Ann. § 70:2(I) (Supp. 1972);
N.J. Rev. Stat. §§ 19:34-35 (Supp. 1976);
N.Y. Election Law § 480 (McKinney Supp. 1972);

These interests are significant enough to justify the limitations placed on both contributions and expenditures. Specifically, as to the limits placed on contributions, in conducting a balancing test, this Court should weigh the fact that "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."[20] *Buckley* v. *Valeo*, 424 U.S. at 20-21.

N.C. Gen. Stat. §§ 163-278.14, 163-278.19 (Supp. 1975);
N.D. Cent. Code § 16-20-08 (1975);
Ohio Rev. Code Ann. § 3599.03 (Supp. 1972);
Okla. Stat. Tit. 26, § 15-110 (1975);
Or. Rev. Stat. § 260.472 (1971);
Pa. Stat. Ann. Tit. 25, § 3225(b) (1977);
S.D. Compiled Laws Ann. § 12-25-2 (1969);
Tenn. Code Ann. § 2-1932 (Supp. 1976);
Tex. Civ. Code Ann. Art. 14.06 (1977);
W. Va. Code § 3-8-8 (1975);
Wisc. Stat. Ann. § 11.38(1)(a)(1) (Supp. 1977);
Wyo. Stat. § 22.1-389(c) and (d) (Supp. 1976).

[20]It is important to note that Appellants' history is one of making contributions and not expenditures to influence votes regarding referendum issues legalizing a graduated income tax in Massachusetts. The Appellants state that they desire to "expend monies in an effort to persuade the voters to vote against the proposed constitutional amendment." Appellants' Brief, 9. Similar assertions were made by three of these Appellants in *FNBI*. In fact, the statement of agreed facts in this case illustrates that contributions were made by four of the Appellants in 1972 and not that they made the kind of expenditures their complaint would suggest are in issue in this case. J.S. App. 41, Ex. "D" of the Record Appendix below, at 48-50. The only money Appellants spent in 1972 regarding the graduated tax referendum was in the form of contributions to the Committee for Jobs and Government Economy. J.S. App. 41, Ex. "D" of the Record Appendix below, at 48-50.

1. Mass. Gen. Laws c. 55, § 8, Furthers The Significant Governmental Interest In Sustaining An Active, Alert Role For The Individual Citizen In the Election Process.

Voting is the "fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). The right to vote has been given to individual citizens, but has not been given to corporations. The state has a significant interest in seeing that the individual citizen's role in the electoral process remains paramount and free from interference in any shape, manner or form by a corporate presence.

As this Court stated in describing the purpose of the federal ban on corporate contributions to elections:

> As the historical background of this statute indicates, its aim was not merely to prevent the subversion of the integrity of the electoral process. *Its underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.* (Emphasis added.) *United States* v. *United Auto Workers*, 352 U.S. 567, 575 (1957).

In a similar vein, the first court ever to rule on the constitutionality of the federal ban on corporate contributions to elections declared that corporations "are not citizens of the United States, and, so far as the franchise is concerned, must at all times be held subservient and subordinate to the government and the citizenship of which it is composed." *United States* v. *United States Brewers' Association*, 239 Fed. 163, 168 (W.D. Pa. 1916).

As important as the state's interest is in sustaining the active role of individual citizens in candidate elections, this same state interest in referenda and initiatives, if anything, is greater. Referenda were generally introduced in the progressive era as a way to reduce the influence of special interests. Wolfinger and Greenstein, "The Repeal of Fair Housing in California: An Analysis of Referendum Voting," 62 Am. Pol. Sci. Rev. 753, 767 (1968). The referendum and initiative are the people's forum. They can be considered the purest form of democracy. When the regular political process (which includes interest group and corporate lobbying, as well as political bargaining) fails, the people have been given the final say. What makes referenda and initiatives unique is that they are not a part of the regular political process, subject to regular political influences. The government has a strong interest in keeping this people's forum free from third party influence.

2. Mass. Gen. Laws c. 55, § 8, Furthers The Significant Governmental Interest In Sustaining The Individual Citizen's Confidence In Government.

In *C.S.C.* v. *Letter Carriers, supra*, this Court sustained restrictions on political activity by public employees, declaring, "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." 413 U.S. at 565. This Court also noted in *C.S.C.* that one legitimate governmental purpose was to limit the political influence of federal employees on others and on the electoral process. *Id.* at 557, 558. Thus, *C.S.C.* makes it

clear that limiting the political influence of a group with special privileges, in order to restore confidence in government and the electoral process, is a significant governmental interest. Just as political employees have gained by grace of their relationship with the government a position potentially giving them the power to unduly influence an election, corporations, having been endowed by the state with a collective impact on society for economic purposes, *United States* v. *Morton Salt Co.*, *supra*, at 652, have gained the power to unduly influence elections. Just as the government was able to limit the influence of political employees gained through their peculiar relationship to the state, the government should also be able to limit the influence of corporations gained because of special privileges granted for non-political purposes.[11]

Corporations have so significantly influenced initiatives and referenda in the past that their power has inevitably undercut the individual citizen's confidence that as an individual he can still make a difference. Voter choices in referenda and initiatives are likely to be more responsive to group influence than in general election voting, where party identification guides most voters. Wolfinger and Greenstein, *supra*, at 762. Corporations have spared no expense in spending to influence initiatives and referenda. The case at bar provides a good example. In 1972, a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax was put before the voters. J.S. App. 7. Appellants First National Bank of Boston, New England Merchants National

[11] *Buckley* is inapposite. This case, like *C.S.C.*, presents the very limited issue of preventing undue influence resulting from the misuse of governmental privileges and powers granted for one purpose but potentially usable for another.

Bank, Wyman-Gordon Company and Gillette Company each contributed $3,000 to the Committee for Jobs and Government Economy to oppose the amendment. J.S. App. 35-37.

The only duly organized non-elected political committee to raise and expend money to oppose the proposed amendment in 1972 in fact was the Committee for Jobs and Government Economy. It raised and expended one hundred twenty thousand dollars in 1972, J.S. App. 41, the bulk of it raised through large corporate contributions. In fact, the Committee raised $112,436.50 in a two-week period between the date of its organization on June 6 and June 19, 1972. *See*, Record Appendix of court below, pp. 48-84.

The only duly organized non-political committee to raise and expend money to promote the 1972 proposal was the Coalition for Tax Reform, Inc. J.S. App. 41. The records on file with state officials indicate it raised and expended only seven thousand dollars in support of the ballot question. J.S. App. 41. Thus, the named corporate plaintiffs in this case themselves may have contributed more money in 1972 to oppose the graduated income tax amendment than all of the measure's proponents combined contributed to promote its passage. Of course, the individual contributions by corporate managers are not a factor in this calculus. In light of this history, restoring confidence to the Massachusetts voter that initiatives and referenda are not controlled by corporations represents an extremely significant governmental interest.

3. Mass. Gen. Laws c. 55, § 8's Prohibition On Corporations Spending The Stockholders' Money For Political Purposes Furthers The Significant Governmental Interest In Protecting Stockholders Who May Hold Political Views Contrary To Those Held By Corporate Management.

Appellants concede that the decision to spend corporate money to oppose a graduated income tax was made by the corporate management and did not involve any stockholder input. Appellants' Brief, 53, n. 31. Such a decision by corporate management, if carried out, would violate the rights of the shareholders to support those political views of their own choosing.[11]

[11] One commentator has concluded:

> [T]he present power of corporate officials also seems acceptable because it retains a certain legitimacy, based upon a belief that even with this power, management will administer corporate assets in the best interests of shareholders, employees, and others connected with the enterprise. In business affairs, a common interest in profits may assure beneficial administration, and the business expertise of management seems to justify abnegation of shareholder control. . . . But when management purports to speak for the corporation, with corporate assets, on matters of public welfare, the premise of an underlying consensus would seem to break down. Public welfare is a matter of basic values, on which shareholders and employees in a publicly held corporation can be expected to differ. And except for political proposals directly affecting the industry, management cannot be considered expert in these affairs. Note, "Corporate Political Affairs Programs," 70 Yale L.J. 821, 834 (1961).

The case at bar provides a particularly good example of how stockholders and management are unlikely to enjoy a consensus on political issues. The proposed graduated income tax was aimed at shifting some of the tax burden off of lower and middle class individuals and onto upper class individuals. It can be assumed that the stockholders consist of upper and middle class individuals, while the corporate management is composed only of the upper class. Thus, in this case, the corporate managers were seeking to use stockholder funds to oppose a measure contrary to the manager's personal interests, but which most likely would have directly benefited many of the shareholders.

Protection of minorities from the compulsory contribution of money for political purposes not of their own choosing has long been recognized as a legitimate governmental interest. Thomas Jefferson declared "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." I. Brant, James Madison: The Nationalist at 354 (1948).

President Theodore Roosevelt declared in his annual message to Congress on December 5, 1905:

> All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes.

Congressman Williams of Mississippi commented during the hearings on the original Federal Act prohibiting corporate campaign contributions:

> [N]o corporation has the right, and no board of directors of a corporation and no manager of a corporation has the right, to embezzle the money belonging to the stockholders of the corporation and to divert it from its legitimate use to a purpose for which the company was not chartered by appropriating it to Democratic, Republican, Populist, Socialist, or any other campaign fund. Hearings before the House

Committee on the Election of the President, 59th Cong., 1st Sess. 76; 40 Cong. Rec. 96.

Just this year, this Court in *Abood* v. *Detroit Board of Education*, 45 U.S.L.W. 4473 (May 27, 1977), struck down as unconstitutional the use of union shop dues for political and ideological purposes. The Court held that compelling an individual to make political contributions infringes that individual's First Amendment rights. 45 U.S.L.W. at 4480. The Court declared that "the Constitution requires . . . that such [union] expenditures [for political purposes] be financed from charges, dues or assessments paid by *employees who do not object to advancing those ideas* and who are not coerced into doing so against their will by the threat of loss of governmental employment." (Emphasis added.) 45 U.S.L.W. at 4480. For these same reasons, the Eighth Circuit in *United States* v. *Pipefitters Local Union No. 562*, 434 F. 2d 1116, 1123 (8th Cir. 1970), rev'd on other grounds, 407 U.S. 385 (1972), upheld the Federal ban on union campaign contributions, noting that there is a compelling interest in "protect[ing] union members holding political views contrary to those supported by the union from use of funds contributed by them to promote acceptance of those opposing views."

The logic of these cases protecting union members applies equally to the stockholder's situation. Senator Robert Taft noted in the debates on extending Federal campaign prohibitions to unions that "the prohibition . . . against labor unions using their members' dues for political purposes . . . is eactly the same as the prohibition against a corporation using its stockholders' money for political purposes, and perhaps in violation of the wishes of many of its stockholders." 93 Cong. Rec. 6438 (1947).

Two recent cases have upheld bans on corporate campaign contributions, noting among other reasons the need to protect shareholders who may hold political views contrary to those held by corporate management. In *Schwartz* v. *Romnes*, 357 F. Supp. 30 (S.D. N.Y. 1973), rev'd on other grounds, 495 F. 2d 844 (2d Cir. 1974), the court declared:

> In enacting corrupt practices legislation, the United States Congress and the various state legislatures have sought to protect the elective process from the undue influence which corporations might exercise through financial contributions. In addition, they have sought to prevent corporate officials from devoting the assets of a corporation to political causes with which its shareholders might not agree. See *United States* v. *Congress of Industrial Organizations, supra*, at p. 113, 68 S. Ct. 1349. These overriding governmental interests are sufficient to justify the regulation of corporate participation in electioneering efforts. *Id.* at 36.

United States v. *Chestnut*, 533 F. 2d 40, 50, 51, n. 12 (2d Cir. 1976), cert. denied, 429 U.S. 829 (1976), is of particular significance, because the court specifically noted that nothing in *Buckley* was contrary to upholding a ban on corporate campaign contributions on the grounds of the government's interests in preserving the integrity of the electoral process and preventing corporations from using general funds for political purposes without the consent of the stockholders.

B. *Mass. Gen. Laws c. 55, § 8, Avoids Unnecessary Abridgement Of First Amendment Rights.*

Appellants assert that even if some of the State's interests may be justifiable, the legislature has not even attempted to adopt the least restrictive alternative available. Appellants' Brief, 54, n. 32. However, as this Court stated in *Rosario* v. *Rockefeller*, 410 U.S. 752, 762, n. 10 (1973), "[i]n requiring that the state use to a proper end the means designed to impinge minimally upon fundamental rights, the Constitution does not require that the state choose ineffectual means."

Appellants raise three specific arguments in support of their contention that Mass. Gen. Laws c. 55, § 8, does not employ the least drastic alternatives. Appellants state:

> . . . Section 8 bars, instead of merely limiting, all expenditures on the ballot question at issue. Furthermore, any interest in preventing the use of corporate funds to express political viewpoints contrary to the desires of shareholders might be attempted to be satisfied by requiring a majority vote of shareholders for political expenditures, or perhaps notification to the shareholders. Appellants' Brief, 54, n. 32.

This brief, *supra*, at - , has already discussed Appellants' contention that Section 8 acts as a bar rather than only a limitation on corporate expenditures and contributions. As pointed out, corporate managers as individuals are not limited in any way whatsoever, and even the corporation retains numerous means for conveying the managers' opinions. The district court in *United States* v. *Chestnut*, 394 F. Supp. 581 (S.D. N.Y. 1975), aff'd, 533

F. 2d 40 (2d Cir. 1976), cert. denied, 429 U.S. 829 (1976), upheld the federal ban on corporate campaign contributions and expenditures against a "least drastic alternative" argument. The lower court stated:

> Given the government's legitimate interest in the purposes of section 610, the question is whether the government has chosen the "least drastic means" of protecting these interests or whether it has enacted overly broad prohibitions that unnecessarily impinge upon First Amendment rights. . . . As authoritatively construed by the Supreme Court, the statute only prohibits contributions or expenditures from certain sources. For example, the statute prohibits only union contributions from monies derived from compulsory union dues and assessments. . . . [I]n *United States* v. *C.I.O.*, the Supreme Court held that the statute does not prevent unions or corporation from publishing a regular periodical for union members, shareholders or customers that may contain political commentary. . . . Thus the statute has been construed in a careful fashion to minimize its restrictive impact. *Id.* at 591.

Appellants' proposed less restrictive alternatives do not offer effective means for protecting minority rights. First, Appellants suggest that requiring a majority vote of shareholders for political expenditures would protect those shareholders who hold contrary political views to those of management. However, placing a matter to a vote in the endocractic corporation does not protect shareholder rights. One commentator noted that research has failed to uncover a single shareholder proposal that has been adopted over

the opposition of the management of an endocractic corporation. Note, "Corporate Political Affairs Programs," 70 Yale L.J. at 849. This same commentator cited as some of the reasons for this shareholder impotency the practice of fiduciary and institutional holders always to vote their proxies as requested by management, and the fact that a majority of individual owners holding stock in "street" name fail to designate the manner in which they wish proxies to be voted, thereby permitting banks and brokerage houses to do the actual voting. *Id.* at 849.

Of even more importance, Appellants' "majority vote" proposal does not even conceptually protect minority stockholders. What is at stake is "compel[ling] a man to furnish contributions of money for propagation of opinions which he disbelieves." Thomas Jefferson in I. Brant, *supra*, at 354. The fact that a majority of stockholders support a proposal does not in any way lessen the compulsion inflicted on the minority stockholder. For this reason, the court in *United States* v. *Boyle*, 482 F. 2d 755 (D.C. Cir. 1973), upheld the ban on union campaign contributions over objections that minority interests are adequately protected by the democractic procedures under which a union must operate. The court concluded:

> By definition the protection of minority interests requires that the majority be restrained in exercising its will over the minority. If a union could expend "involuntary" funds upon the vote of a majority of its members, minority interests would not be protected — they would be rendered irrelevant. *Id.* at 763.

Finally, Appellants propose that minority interests could be protected effectively by a system of notification to the

shareholders of political stances taken by the corporate managers. Conceptually, this proposal gives less protection to minority stockholders than a majority voting plan, which, as just discussed, must itself be found wanting. In fact, under this proposal, management could spend the shareholders' money even if a majority of stockholders held a different political view. One commentator has addressed this exact issue of whether notification of political activity would be a valid, less restrictive alternative than a ban on corporate campaign expenditures and contributions. Comment, "The Constitutionality of the Federal Ban on Corporations and Union Campaign Contributions and Expenditures," 42 U. of Chicago L. Rev. 148 (1974). The commentator reasoned:

> [A] notice system fails to qualify as a less drastic means of protecting the dissenting stockholders for two reasons. First, it might reduce the number of investments acceptable to an investor. Although corporate securities are somewhat interchangeable, they are not fungible. The notice system could force the investor to choose between an otherwise optimal investment and his political principles, a dilemma the Act seeks to prevent. The second problem would arise in the transition from the current system to a notice system. Rather than merely choosing among new investment opportunities, current shareholders who object to political contributions made subsequent to the adoption of this alternative scheme would have to sell their investments, subjecting their appreciated value to capital gains taxes. . . . [E]ven if it were less restrictive of the corporation's first amendment rights, the notice scheme is not a comparable alternative to section 610, because it would fail to provide investors who

object to political contributions with an equal choice of investment opportunities, and would thus not protect minority interests to the same extent as section 610. Therefore, it cannot be considered a less restrictive alternative to the voluntary contribution system. *Id.* at 157, 158.

Thus, Appellants have been unable to present any proposed less restrictive alternatives which would effectively protect the minority interests presently protected by Mass. Gen. Laws c. 55, § 8.

V. The Statutory Provision Prohibiting Corporate Contributions To Affect The Outcome Of Questions Relating Solely To Individual Taxation Is Not Vague And Contains No Evidentiary Presumption.

While the primary thrust of the plaintiff corporations' due process argument is the assertion of a constitutional right freely to contribute money to affect ballot questions, they have also catalogued a series of other imagined due process infirmities. Specifically, they argue that provisions of Mass. Gen. Laws c. 55, § 8, are impermissibly vague, and that the statute contains an unreasonable evidentiary presumption.[13] Neither of these claims is worthy of extended discussion.

[13] The Appellants had argued below that the statute was impermissibly overbroad. They have apparently dropped their overbreadth claim on appeal and this brief therefore does not separately address overbreadth.

A statute is void for vagueness only "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-03 (1969). Statutes must "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *C.S.C.* v. *Letter Carriers*, 413 U.S. 548, 579 (1973).[14] It is not asserted that Mass. Gen. Laws c. 55, § 8, contains the most precise or appropriate language possible. Recognizing, however, that "there are limitations in the English language with respect to being both specific and manageably brief," *id.* at 578-79, and that "words inevitably contain germs of uncertainty," *Broderick* v. *Oklahoma*, 413 U.S. 601, 608 (1973), it is submitted that the statutory proscription is drawn with the degree of specificity required by the Constitution and that it afforded the Appellants fair warning that their desired course of action was unlawful. *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972).

The Appellants direct their vagueness challenge at the "materially affecting" phrase which appears in the first sentence of Mass. Gen. Laws c. 55, § 8. Their focus on the alleged vagueness of this statutory term is inappropriate. In construing the challenged statute, the highest court of the Commonwealth has determined that it proscribes two separate but related courses of conduct. The first prohibition is general in nature and runs against corporate

[14] Because we have demonstrated at Parts II and III that the Appellants lack First Amendment rights, cases suggesting a stricter vagueness standard where speech is involved are inapplicable. *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Smith* v. *Goguen*, 415 U.S. 566 (1974).

contributions to favor or oppose ballot questions which will not "materially affect their business, property or assets." The second prohibition is specific in terms and runs against corporate contributions to favor or oppose questions dealing with the taxation of individuals. The Appellants fall within the scope of this second specific prohibition, which requires no showing of a lack of material effect. J.S. App. 24, n. 19. The case before this Court does not properly raise the issue the Appellants have chosen to brief.[15]

In any event, there can be no doubt that the Appellants were fairly put on notice that contributions to oppose the 1976 graduated income tax amendment were prohibited by Mass. Gen. Laws c. 55, § 8. Whether the statute creates one crime or two, the legislative and judicial history of the statute clearly indicates that the law was specifically amended to reach such contributions. See discussion at J.S. App. 5-8. Indeed, the Appellants themselves characterize the statute as one containing "a tailor made prohibition against graduated income tax expenditures." Appellants' Brief, 21, n. 6. Whatever the phrase "materially affecting" might mean, the second sentence of the statute makes it clear that questions pertaining solely to the taxation of individuals do not meet the standard. These Appellants therefore fall within the "hard core" of corporations, whose conduct could not be more clearly prohibited, however the

[15] It is beyond dispute that the Supreme Judicial Court's determination of the meaning of Mass. Gen. Laws c. 55, § 8, is a matter of state law and is not reviewable by this Court. This Court's power over state judgments is the power "to correct them to the extent that they incorrectly adjudge federal rights. . . . [The Court is] not permitted to render an advisory opinion . . .." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945). Since the statutory proscription affecting the Appellants is one which does not require a "material effect," consideration of the alleged vagueness of that phrase would be inappropriate on this appeal.

statute were rewritten. *See*, *Smith* v. *Goguen*, 415 U.S. 566 (1974).

As a final due process argument, the Appellants assert that the second sentence of Mass. Gen. Laws c. 55, § 8, incorporates a presumption of fact which is unreasonable and is, therefore, violative of the Fourteenth Amendment. Appellants' Brief, 82-87. More specifically, the corporations argue that the sentence relieves the prosecution of its burden of proving beyond a reasonable doubt that a particular ballot question will not materially affect a defendant corporation.

This argument depends entirely on the premise that Mass. Gen. Laws c. 55, § 8, creates a single crime, *i.e.*. that of contributing or expending corporate funds to influence the outcome of ballot questions which questions will not materially affect corporations. This premise is expressly rejected not only by the court below, but also by the Appellants themselves. Appellants' Brief, 15, 85.

As contrued by the highest court of the Commonwealth, the second sentence of Mass. Gen. Laws c. 55, § 8, contains no evidentiary presumption. Instead, it creates a specific crime. The lack of a material effect is not an element of that crime. J.S. App. 28. The device of a presumption to aid in the prosecution of a case is therefore not utilized by the statute, and Appellants' irrebuttable presumption analysis is simply inapposite.

Even if the statute did erect such a presumption, it would not necessarily fail. A legislatively imposed presumption will pass constitutional scrutiny if it can be said "with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary* v. *United States*, 395 U.S. 6, 36 (1969). The Appellants have suggested nothing credible here or in the court below to rebut the legislative judgment that the

taxation of individuals has no material effect on corporations. A dispute among experts as to the indirect impact of such taxation is an insufficient factual basis for invalidating a statute advancing clearly legitimate state interests.

VI. The Equal Protection Clause of the Fourteenth Amendment Is Not Violated By A Statute Prohibiting Contributions To Affect Ballot Questions Made By Business Corporations.

The equal protection clause of the Fourteenth Amendment does not prevent the establishment of classifications which may result in unequal treatment of various classes. Instead, it prohibits the enactment of laws containing irrational and arbitrary classifications. *McGowan* v. *Maryland*, 366 U.S. 420, 425-26 (1961). It further mandates that, within a particular class, the law must be evenly applied.

Guidance for judicial inquiry in equal protection cases involving elections is provided in *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), where this Court stated, "we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Id.* at 335. This section of Appellee's brief tracks the analytical approach adopted in that case.

A. *The Character of the Classification*

Mass. Gen. Laws c. 55, § 8, proscribes conduct by business corporations incorporated or doing business in the Commonwealth. That conduct would be lawful if engaged

in by individuals, labor unions, non-profit corporations and certain other business entities. The classification implicit in this proscription is based on economic differences and not on suspect criteria. Distinctions based on race, illegitimacy, alienage and arguably on gender are suspect and are subjected to strict judicial scrutiny.[10] *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973). Classifications based on economic differences, on the other hand, are normally reviewed under traditional "minimum rationality" standards. *Liggett Co.* v. *Lee*, 288 U.S. 517 (1933).

Business corporations differ from the entities with which they desire to be grouped in a number of significant ways. First, laws pertaining to taxation and tort liability have tended to encourage the accumulation of vast sums of money in corporate hands. Second, the expenditures of business corporations are by definition spurred by the profit motive. Third, business corporations hold and expend funds belonging to shareholders whose political views may be antithetical to those of the corporate managers and who ordinarily have invested in a particular corporation for purely financial reasons. These economic factors, in differing combinations, differentiate business corporations from each of the other artificial entities with whom they claim parity.

Labor unions, for instance, normally do not hold vast sums of money. They are associations of individuals united for the common purpose of improving their employment rights which also operate various social services for their

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[10] *See, Loving* v. *Virginia*, 388 U.S. 1 (1967) (race); *Levy* v. *Louisiana*, 391 U.S. 68 (1968) (illegitimacy); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973) (alienage); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (gender).

members. They have no shareholders.[17] Partnerships, whether limited or general, do not enjoy the same tax benefits as corporations and ordinarily do not hold vast sums of money. They also lack shareholders.[18] Non-profit corporations in the Commonwealth are not motivated by profit considerations and may, in fact, be created for the explicit purpose of furthering the political beliefs of their members. *See*, *NAACP* v. *Button*, 371 U.S. 415 (1963).

Based on the foregoing, even the Appellants cannot quarrel with a characterization of the classification as an economic one.

B. *The Individual Interests Concerned*

Whether or not the parties agree on a characterization of the classification as economic, there is certainly no agreement as to the existence of individual interests. When a fundamental interest is affected by a classification, the Court again engages in a strict scrutiny inquiry, *see*, *e.g.*, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966), and the Appellee freely concedes that freedom of speech is a fundamental right requiring application of the strict scrutiny test. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973); *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 101 (1972).

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[17] For a discussion of the differences between labor unions and business corporations in the context of political contributions *see*, Rauh, "Legality of Union Political Expenditures," 34 S. Cal. L. Rev. 152, 162, n. 49 (1961).

[18] In fact, the lack of shareholders distinguishes all other entities from business corporations except business trusts and real estate investment trusts. J.S. App. 22-23.

As we have previously shown, however, corporations not engaged in the business of communication or speech simply do not possess freedom of speech. Part II, *supra*. Assuming, *arguendo*, that they possess such a freedom, its scope is limited to situations where its exercise is necessary to protect the business, property or assets of corporations. Part III, *supra*. The lower court found that the corporations before this Court on appeal had failed to sustain their burden, as plaintiffs in a civil action, of proving that the graduated income tax amendment question would materially affect their business, property or assets. Hence no individual interests operate on the side of the Appellants.

This is not to say, however, that individual interests are unaffected by the challenged classification. The exclusion of corporate contributions to oppose ballot questions affects a number of individual interests which are served by the challenged classification. Those interests not only militate against application of a strict scrutiny test; they are themselves the governmental interests which justify the ban on corporate contributions.

C. *The Government Interests Asserted In Support Of The Classification*

In Part IV, A, of this Brief we have articulated the interests which justify restricting the political "speech" of corporations in the face of a First Amendment challenge. We have shown that Mass. Gen. Laws c. 55, § 8, is intended to sustain the role of the individual citizen in the election process, particularly in the area of the popular initiative and referendum which are intended to be the "people's process." Part IV, A, 1. We have also demonstrated the need to maintain the individual citizen's confi-

dence in government by eliminating the unrestricted flow of corporate funds to politicians and political causes. Part IV, A, 2. Finally, we have shown that the ban on corporate political contributions is necessary to protect stockholders from the coerced use of their funds for the promotion of political views antithetical to their own.[29] Part IV, A, 3. These identical interests warrant singling out business corporations for special attention.

The lower court itself recognized that these interests justified disparate treatment for business corporations. It held that business corporations were properly distinguished from most other artificial entities organized or doing business in the Commonwealth, simply because the other entities lack shareholders. J.S. App. 22. This distinction is inapplicable only to business trusts and real estate investment trusts (REIT's). Even business trusts and REIT's stand on a different footing than business corporations, however. Differences in their organizational structure submit them to varying degrees of regulation by federal and state governments and the tax consequences of their organization differ slightly from those of business corporations. This bears directly on the possibility that they will accumulate large sums of money capable of being expended for political purposes.

Whatever the technical distinctions among these entities might be, the fact remains that only business corporations have in the past exerted what may be deemed undue influ-

[29] Never is the need to protect minority stockholders more obvious than when a question concerning the taxation of individuals is involved. In such situations the existence of even an indirect impact on business corporations is speculative. Meanwhile, the personal interests of corporate managers are directly implicated. Thus the objectivity of a management decision to favor or oppose such a question is highly suspect.

ence in the political sphere. The record in this case amply illustrates that the 1972 campaign to oppose a graduated income tax amendment was dominated by corporate funds, not funds from REIT's or business trusts.[30] Nor is the experience on this particular question unique; the pattern of corporate spending in initiative campaigns is common to all jurisdictions which have provisions for submitting questions to the voters and which do not restrict corporate contributions.[31]

The Massachusetts legislature may justifiably have concluded on this basis alone that spending by REIT's, business trusts and other artificial entities simply does not pose a serious threat to the integrity of the initiative process. In any event, "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 110 (1949). It is no indictment of the Massachusetts statutory scheme that it could have gone further and proscribed contributions and expenditures by other business entities as well. The legislature may act selectively, and a prohibition otherwise within its power will not fail merely because it does not also reach every other class whose conduct may be interdicted. *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 (1970); *United States* v. *Petrillo*, 332 U.S. 1, 8-9 (1947); *Sproles* v. *Binford*, 286 U.S. 374, 396 (1932). In fact, the particularity of the

[30] The campaign finance reports of the committee organized to oppose the 1972 graduated income tax amendment are referenced in the appendix, App. 25, but because of their length have been omitted from the document itself. They appear as Exhibit D at pp. 48-84 of the Record Appendix submitted below.

[31] *See, e.g.*, State of California Fair Political Practices Commission, "Campaign Contribution and Spending Report," March 14, 1977.

statute may be its greatest virtue, for as the opinion of the lower court suggests, the General Court of Massachusetts has "clearly identified . . . the parameters of corporate free speech." J.S. App. 13. Further proscriptions may have the effect of impinging on the rights, if any, of other business entities.

Conclusion

For the foregoing reasons, this case has become moot and this appeal should be dismissed. In the alternative, this Court should affirm the judgment of the Supreme Judicial Court of Massachusetts, because Mass. Gen. Laws c. 55, § 8, is consistent with the First and Fourteenth Amendments.

Respectfully submitted,

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July, 1977.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION,
and
WYMAN-GORDON COMPANY,
APPELLANTS,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
APPELLEE.

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

APPELLANTS' REPLY BRIEF

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NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
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and
WYMAN-GORDON COMPANY,
APPELLANTS,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
APPELLEE.

**On Appeal from the Supreme Judicial Court
for the Commonwealth of Massachusetts**

APPELLANTS' REPLY BRIEF

NOTE: This reply brief is not a comprehensive treatment of the issues. It is a seriatim response to some of the points raised by the Appellee. Appellants respectfully refer the

Court to their main brief for fuller coverage of each of the topics mentioned herein.

I. The Action Is Not Moot

A. *The Time Frame Precludes Review By This Court.*

Appellee's statements with respect to the time available for litigation actually demonstrate the truth of Appellants' contention that the statutory proscription against corporations operated in a time frame too short for complete adjudication. The Attorney General points out that a suit to challenge Mass. Gen. Laws c. 55, §8 could have been commenced "nearly eighteen months prior to the election" (A. Br., 11):[1]

> If the suit had begun in May of 1975 and proceeded through all stages at exactly the same pace as this litigation, it could have been submitted to this Court while the controversy was a current one. Thus the limited period for review in this case is a direct consequence of the Appellants' trial strategy and is not a result of the operation of natural or man-made laws.

No matter when commenced, this case could not have been brought through to a Supreme Court conclusion in time to afford Appellants relief. *Cf. Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911) (2 year order of ICC deemed "evading review"). The instant action was commenced by seeking declaratory relief before a single justice of the Supreme Judicial Court on April 9, 1976. The case was argued before the full court on June 8, 1976. Although judgment was rendered on September 28, 1976, no opinion

[1] Appellee's brief is cited herein as "A. Br.".

issued until February 1, 1977, eight months after argument. This Court denied Appellants' motion to stay the decision of the Supreme Judicial Court on October 6, 1976. The case is scheduled for oral argument before this Court 19 months after the filing of the complaint. Assuming, *arguendo*, that exactly the same time would have been consumed had Appellants filed their complaint on May 8, 1975, one day after the Massachusetts legislature took the final action necessary to place the graduated income tax amendment on the November 1976 ballot,[2] Appellants would have presented argument to this Court no earlier than December 1976. The election was held November 2, 1976. A decision following this argument would have come several weeks or months after the election.

Furthermore, any decision invalidating the statute and allowing corporate spending would have to come well in advance of the election date itself in order to allow Appellants an opportunity to make any effective communication to the voters. The right to communicate, if recognized two days or two weeks before the election, would have little value.

The Attorney General does not, and could not, argue that the case would indeed have proceeded through the Supreme Court in less than eighteen months had the action been commenced in May, 1975. In fact, it is unlikely that any such suit would have proceeded as fast as the instant action did. The relative speed with which this case was acted upon was due in no small measure to the courteous cooper-

[2] After passage by two consecutive sessions of the Massachusetts General Court, a proposed constitutional amendment must be certified by the clerk of the joint session to the Secretary of the Commonwealth before it can be submitted to the voters. Mass. Const. Amend. Art. 48, IV, §5. The amendment in question received final approval by the General Court on May 7, 1975 and was received by the Secretary's Office on May 29, 1975. (J.S. 9 n.4, J.S. App. 43-44).

ation of the Attorney General and the active assistance of the Massachusetts single justice, who perceived that the issue at stake was both novel and important and that time was pressing. Considerable expedition was afforded this case so that the Massachusetts court itself could rule on the matter before the election. Furthermore, if one uses the instant case as a guide but looks to the court schedules which would have been encountered had the action actually been commenced in May, 1975, this Court would not have heard argument until February, 1977—20 months after the filing of the complaint and three months after the election.[3]

In conclusion, nothing in the record suggests that delay was a trial strategy. It was not. The earlier the case had been commenced, the less likely speedy treatment would have been afforded. Even had an action, commenced in May of 1975, proceeded at the same pace, this Court would not have heard oral argument before the election. It is totally unlikely that an opinion could have issued in time to permit meaningful expenditures or contributions.

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[3] This action, commenced on April 9, 1976, was argued before the full bench of the Supreme Judicial Court two months later. An action commenced in May, 1975 would not have been argued until September, 1975, at the earliest given the summer recess. *Calendar of Assignments of the Justices of the Supreme Judicial Court of Massachusetts for the year beginning September 1, 1975 and ending August 31, 1976.* If there had been an argument before the full bench in September, 1975, no opinion could be expected until May, 1976 based on the eight month delay in the instant case. This Court adjourned on July 6, 1976. *Journal of the Court for the 1975 Term*, at 777. Once again, based on the record in the instant action, no summary reversal, stay, or injunction would have been granted by this Court, nor would the action have been expedited. Such relief was in fact denied in this case. Based upon the fact that oral argument in the instant case has been scheduled nine months after the issuance of the Supreme Judicial Court opinion, the matter would not have been argued before this Court until February, 1977.

B. *Reasonable Likelihood That The Issues Could Recur.*

The Attorney General argues that it "cannot be conclusively presumed" that a graduated income tax question will again be placed on the ballot (A. Br. 9). But a "reasonable expectation" and not a conclusive presumption is all that is required. *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). *See also Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). The precise form which the next proposed tax question may take is not critical. Chapter 55, §8, prohibits expenditures or contributions with respect to *any* ballot question dealing solely with taxation of individual income or property.

The contention that a future case will present a better record (A. Br. 8, 10) ignores the fact that a central issue on appeal is whether such a record must be produced, in other words, whether Appellants' First Amendment rights depend upon *proof* by Appellants that their interests are in fact materially affected. To argue that action by this Court should await a case with a "better record" ignores not only the actual record in the instant action, which includes a detailed statement of facts, but also ignores Appellants' argument that the type of trial necessary to produce a "better record" is itself an impermissible burden upon, and chills the exercise of, First Amendment rights.

This Court has been especially sensitive to the need to avoid an unrealistic and formalistic test of mootness in the First Amendment context. *E.g., Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546-47 (1976). The continuing nature of the controversy and the need for clarification by this Court is well illustrated by a recent Supreme Judicial Court ruling, in which that court declined to answer certain questions propounded by the House of Representatives of the Commonwealth of Massachusetts with respect to the consti-

tutionality of proposed changes to Mass. Gen. Laws c. 55, §§6, 7 and 8 because the instant action was pending before this Court and its resolution would affect the entire statute.[4] *Answer of the Justices,* Mass. Adv. Sh. (1977) 1845, ___ N.E.2d ___. The proposed changes would not have altered in any way the specific language in §8 attacked by Appellants. Nevertheless, the Court responded to the House of Representatives as follows:

> While the questions propounded by the House do not directly concern our holding in *First Nat'l Bank,* the entire statutory scheme on which the further limitations imposed by the proposed legislation are engrafted is dependent for its validity on the constitutional validity of the basic limitation contained in the current G.L. c. 55, §8, and continued in §3 of the proposed bill. While any of the limitations contained in the proposed bill may have their validity or invalidity adjudged in the abstract, in terms of advising the House as to the over-all validity of the proposed legislation the two matters cannot be separated.

[4] The questions propounded by the House were concerned with the constitutionality of a pending bill which would: (1) prohibit committees promoting or opposing ballot questions from receiving more than $1,000 in contributions from any corporation; (2) limit the number of committees promoting or opposing ballot questions to one committee for the opponents and one for the proponents; (3) limit corporations to contributions of $1,000 for each question materially affecting such corporation; (4) prohibit corporations from expending more than $1,000 to influence the vote on any question which materially affects the corporation; (5) prohibit persons or political committees promoting or opposing ballot questions from soliciting or receiving any contributions from persons, political committees or corporations located outside the Commonwealth and (6) prohibit utility companies from including in their billing process information or advertising materials aiding or defeating the nomination or election of any person, promoting or antagonizing the interest of any political party, or from influencing the vote on a question submitted to all voters of the Commonwealth. *Answer of the Justices,* Mass. Adv. Sh. (1977), 1845, 1845-47, ___ N.E. ___, ___.

> The question before the Supreme Court concerning the validity of G.L. c. 55, §8, is an issue of first impression and one of considerable difficulty. *Id.* Mass. Adv. Sh. (1977) at 1851, ___ N.E.2d at ___.

There is a critical need for clarification to eliminate the chilling effect of the continuing statutory restrictions which impinge directly on speech. Note, *First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844 (1970). The heavy criminal penalties for violation of §8 discourage challenge by violation and criminal prosecution. *See* Monaghan, *First Amendment "Due Process",* 83 Harv. L. Rev. 517, 547-49 (1970).

This Court has repeatedly recognized the importance of clarifying the constitutionality of election statutes despite the fact that two to four years are generally available for future litigation. *Storer* v. *Brown,* 415 U.S. 724, 738 n.8 (1974). The holdings in the two election cases relied upon by Appellee (A. Br. 12 n.5) for the proposition that election cases are not unique turned upon factors other than the mere passing of the election. *See* Appellants' main brief at 24 n.10.

II. The Section 8 Prohibition Is Unconstitutional as a Violation of Freedom of Expression.

The Attorney General characterizes Mass. Gen. Laws c. 55, §8 as a "law [which] simply forbids corporate managers from spending corporate money to express their *personal views"* (A. Br. 18) (emphasis added). At the same time the Attorney General has *agreed* that it is the position of the Appellants' management that Appellants' business and property would be materially affected. (A. 17-21). The personal views of Appellants' corporate managers are not at issue in this case and the record does not reflect what

those views may be. The Supreme Judicial Court did not construe the law simply as forbidding expression of personal views. It specifically held that §8 prohibited expenditures or contributions despite a reasonable belief by management that the interests of the company were materially affected. (J.S. App. 15 n.15.)

People v. *Gansley*, 191 Mich. 357, 158 N.W. 195 (1916), relied upon by Appellee for the proposition that restrictions on corporate expenditures in election campaigns do not violate the due process clause (A. Br. 24) has been effectively undercut by *Advisory Opinion 1975 PA 227*, 396 Mich. 465, 242 N.W. 2d 3 (1976), in which the Supreme Court of Michigan differentiated between corporate contributions or expenditures for the purpose of influencing the nomination or election of a candidate and those made for the purpose of influencing the passage or defeat of a ballot question.

> Contributions or expenditures by corporations to communicate their positions or opinions concerning ballot questions serve to enlighten the public and encourage an informed decision-making process. [Footnote omitted] Such contributions or expenditures create no danger of incurring obligations from an elected official to a major contributor. The right of the public to be informed is a paramount consideration in seeking to preserve the free exchange of ideas in the market place. [Footnote omitted] *Id.*, 396 Mich. at 494; 242 N.W.2d at 14.

Appellee seeks to justify §8's total prohibition of expenditures or contributions with respect to one type of ballot question by referring to the undisputed proposition that corporations may be regulated by the state. Appellee goes on to state that "[t]his Court repeatedly has upheld over

First Amendment objections regulatory schemes which restrict corporate communication so long as they do not discriminate against communications media." (A. Br. 25). However, none of the decisions cited in support of this statement (A. Br. 25-26) focus on the 'corporateness" of the petitioner, and the results presumably would have been the same regardless of whether or not corporations were involved.[5] Appellees do not dispute that regulatory schemes which incidentally impinge upon First Amendment rights have been upheld. The instant case does not fall within that category.

In support of its argument that "[t]he Commonwealth has substantial interests in preventing corporations from making contributions or expenditures to influence the vote on referendum and initiative issues", Appellee refers the Court to 30 state statutes and the Federal Corrupt Practices Act, 2 U.S.C. §441(b), as examples of statutes "restricting contributions either by limiting them as to amount or restricting the source from which they are received." (A. Br. 32, n.19). Section 8 does not merely limit contributions. It totally prohibits them. Furthermore, §8 prohibits not only all contributions but all expenditures. Few of the statutes cited by the Attorney General are as sweeping.[6] The list of statutes is misleading for other

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[5] Cases such as *Associated Press* v. *NLRB*, 301 U.S. 103 (1937) (A. Br. 25), actually support Appellants' contention that the media has no special First Amendment protection. In that action, the Court held that the discharge of an employee by the Associated Press was subject to the National Labor Relations Act.

[6] Federal Corrupt Practices Act, 2 U.S.C. §441(b) does not apply to ballot questions.

Ala. Code. Tit. 17, §286 (1958) prohibits corporate contributions and expenditures to defeat ballot questions.

Ariz. Rev. Stat. §16-471(A), (H) (1975) prohibits corporate contributions for the purpose of influencing an "election", which term does not encompass ballot question "elections".

Ark. Stat. Ann. §3-1110 (1976) does not apply to ballot questions. With respect to candidate contributions, any person, including a corporation, may contribute up to $1,000 per candidate per election.

reasons. It is used to support a purported interest by the Commonwealth in prohibiting spending respecting the vote on ballot questions, but several of the statutes do not prevent corporate spending with respect to ballot questions.

Del. Code Ann. tit. 15, §8004(a) (Supp. 1976) does not apply to ballot questions, and any person may contribute $1,000 per candidate per statewide election.

Fla. Stat. Ann. §106.08(1) (Supp. 1977) does not single out corporations for special treatment. While the statute does apply to ballot questions, it allows contributions up to $3,000 in support of, or in opposition to, an issue to be voted on in a statewide election.

Ind. Code Ann. §3-4-3-3 (Supp. 1976) authorizes corporations to make political contributions to (a) aid in the success or defeat of a principle, measure or proposition submitted to a vote in an election; (b) aid in the election or defeat of a candidate; and (c) to aid in the success or defeat of a political party. Only contributions to, or on behalf of, candidates and political parties are limited.

Iowa Code Ann. §56.29 (Supp. 1977-78) prohibits corporate contributions for the purpose of influencing the vote of any election. *But see* Op. Atty. Gen. (Coleman), June 18, 1975.

Kan. Stat. §25-1709 (1973) prohibits limited types of corporations from paying or contributing in order to influence the vote on any question submitted to the voters.

Ky. Rev. Stat §121-035(1) (Supp. 1976) prohibits corporations from furnishing money or any other thing of value to any "political or quasi-political organization . . . to be used by such organization for any purpose whatever."

La. Rev. Stat. Ann. §18-1488(C) (Supp. 1977) does not apply to ballot questions. It prohibits corporate contributions or expenditures to or on behalf of candidates and political parties unless such contributions or expenditures have been specifically authorized by vote of the board of directors of the corporation.

Me. Rev. Stat. Ann. tit. 21, §§1395.2, 1395.3 (Supp. 1976-77) does not apply to ballot questions; corporations may contribute to a candidate, in support of the candidacy of one person, an aggregate amount no greater than $5,000 in any election.

Md. Ann. Code art. 33, §26-9(b) (1976) does not apply to ballot questions. Corporations, like individuals, may contribute up to $2,500 to candidates in any primary or general election.

Mass. Gen. Laws Ann. c. 55, §8 (Supp. 1976) prohibits corporate expenditures and contributions on ballot questions unless the corporations are "materially affected" by such questions. Additionally, the statute provides that any ballot question solely concerning the taxation of individuals shall be deemed not to materially affect a corporation.

The chief state interest advanced in support of §8 is one of preventing corporate funds from overwhelming the electorate. (A. Br. 35-37) But the record does not support the proposition that corporations have overwhelmed the electorate. Assuming, *arguendo*, that the Coalition for

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Minn. Stat. Ann. §210A.34 (Supp. 1977) prohibits corporate contributions for "any political purpose whatsoever." This may or may not encompass ballot questions. *See Schwartz* v. *Romnes*, 495 F.2d 844 (2d Cir. 1974).

Mo. Ann. Stat. §130.020.5 (Supp. 1977) does not apply to ballot questions. It prohibits labor unions and corporations from making contributions or expenditures in support of or in opposition to any candidate or political committee.

Mont. Rev. Codes Ann. §§23-4795(1), 4744 (Supp. 1975) prohibits corporate contributions and expenditures on ballot questions. *But see C & C Plywood Corp.* v. *Hanson*, 420 F.Supp. 1254 (D. Mont. 1976), *appeal docketed*, No. 76-3118 (9th Cir. September 29, 1976).

N.H. Rev. Stat. Ann. §70:2(I), (II), (III) (1970) prohibits contributions by corporations, partnerships and labor unions for the purpose of promoting the success or defeat of ballot questions.

N.J. Stat. Ann. §19:34-45 (1964) does not apply to ballot questions.

N.Y. Election Law §480 (McKinney Supp. 1976-77) prohibits corporate contributions "for any political purpose whatever". This language has been construed as not applying to ballot questions. *Schwartz* v. *Romnes*, *supra*.

N.C. Gen. Stat. §§163-278.15, 163-278.19 (1976) prohibits corporations and labor unions from making any contributions and expenditures for "any political purpose whatsoever." This may or may not encompass ballot questions. *See Schwartz* v. *Romnes*, *supra*.

N.D. Cent. Code §16-20-08 (Supp. 1977) prohibits corporate contributions and expenditures for any political purpose or for the influencing of legislation.

Ohio Rev. Code Ann. §3599.03 (Baldwin) (1971), which prohibits the use of corporate funds for any "partisan political purpose" has been held not to apply to "the adoption of a constitutional amendment or the passage of a bond-issue or of a tax levy . . ." *Corrigan* v. *Cleveland-Cliffs Iron Co.*, 169 Ohio St. 42, 45, 157 N.E. 2d 331, 334 (1959).

Okla. Stat. Ann. tit. 26, §15-110 (Supp. 1976) prohibits corporate contributions on state ballot questions.

Or. Rev. Stat. §260.472 (1975) does not apply to ballot questions.

Pa. Stat. Ann. tit. 25 §3225(b) (Purdon) (1964) does not apply to ballot questions.

Tax Reform, Inc., the only nonpolitical committee organized to promote the 1972 proposal, raised and expended only seven thousand dollars in support of the ballot question (A. 26),[7] the record is completely silent as to the total amount of money *expended* by individuals, trusts, partnerships, or nonprofit organizations, such as the League of Women Voters. Mass. Gen. Laws c. 55 does not require that such direct expenditures, which are not limited, be reported. The record is also silent as to the total amount of corporate expenditures relating to the 1972 graduated income tax referendum. Thus, with respect to the expenditure ban, the record lends no support to the argument that the statute is supported by a rational, much less a compelling, state interest in preventing undue influence.

The two cases relied upon as supporting bans on corporate campaign contributions (A. Br. 41) are readily distinguishable. Appellee quotes from the district court

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S.D. Compiled Laws §12-25-2 (Supp. 1977) prohibits corporate contributions to a committee collecting or disbursing money for the adoption or defeat of any question submitted to the electors of the whole state.

Tenn. Code Ann. §2-1932 (Supp. 1976) prohibits corporate contributions and expenditures for the purpose of aiding in the success or defeat of ballot questions.

Tex. Elec. Code Ann. art. 14.06 (Supp. 1976-77) prohibits corporations and labor unions from making contributions and expenditures for the purpose of aiding or defeating the approval of ballot questions.

W. Va. Code §3-8-8 (1971) prohibits corporate contributions "for the payment of any primary or other election expense whatever". This may or may not encompass ballot questions. *Cf. Schwartz* v. *Romnes, supra.*

Wisc. Stat. Ann. §11.38(1)(a)(1) (Supp. 1977-78) prohibits corporate contributions and disbursements to promote or defeat referenda.

Wyo. Stat. §22.1-389.2 (Interim Supp. 1977) prohibits corporations, partnerships, trade unions, professional associations and civil, fraternal and religious groups from contributing funds or election assistance to promote the success or defeat of any ballot proposition.

[7] It is likely that the statements filed with the Secretary of State significantly understate actual deposits. (A. 34-36)

decision in *Schwartz* v. *Romnes*, 357 F.Supp. 30 (S.D.N.Y. 1973), noting, without discussion, that it was "reversed on other grounds," 495 F.2d 844 (2d Cir. 1974) (A. Br. 41). However, the casually referenced "other grounds" totally undercut the precedential value of the district court decision. The district court construed a New York statute prohibiting corporate political contributions as prohibiting contributions made to influence referenda, and held that the statute did not violate the First Amendment. The Second Circuit reversed. It held that the statute did not prohibit corporate contributions or expenditures with respect to referenda. The appellate decision consciously adopted a narrow construction specifically to avoid "transgress[ing] constitutional rights . . . including those of corporate contributors which, like individuals, are guaranteed freedom of speech and petition." 495 F.2d at 852 (citations omitted). The Second Circuit unequivocally rejected the notion that the interests which may justify restrictions upon contributions to candidate campaigns are transferrable to restrictions upon referenda contributions. *Id.* at 851.

United States v. *Chestnut*, 533 F.2d 40 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976) is inapposite. The Second Circuit upheld the federal ban on corporate campaign contributions, 18 U.S.C. §610, relying entirely on the district court's discussion of the constitutional claims. *Id.* at 50. The district court specifically recognized "the First Amendment right of corporations and labor unions" but found such rights outweighed by:

> the substantial governmental interests in preserving the integrity of the electoral process, in preventing corporate and union officials from using corporate assets or general union dues to promote *political parties and candidates* without the consent of stockholders or union members with different political views, and in protecting individuals who may refuse to con-

tribute to campaign funds against reprisals. *The need for these safeguards is particularly acute in the labor field where union membership can be a condition of employment.* (emphasis added) (footnotes omitted) 394 F.Supp. 581, 590 (S.D.N.Y. 1975).

Section 610 (now 2 U.S.C. §441b) does not purport to ban contributions or expenditures relating to ballot questions. In order to rule in favor of the Appellants, this Court need not decide whether the Constitution forbids limitations on corporate expenditures or contributions *relative to candidates and political parties.*

Moreover, §610 applies equally to labor unions as well as to corporations and it, unlike c. 55, §8, permits the establishment of segregated funds for political purposes. This factor was noted by the Court in *Buckley* v. *Valeo,* 424 U.S. 1, 28 n.31 (1976), in upholding the $1,000 contribution limitation in the Federal Election Campaign Act, 18 U.S.C. §608(b).

All recent cases which have ruled upon constitutional challenges to statutes restricting contributions or expenditures with respect to ballot questions have considered the *Buckley* decision dispositive,[8] and all have ruled that such

[8] The Supreme Judicial Court's decision also runs counter to recent legal authority clearly establishing the proposition that non-media corporations have First Amendment rights. *E.g., International Union UAW* v. *National Right to Work Legal Defense and Education Foundation, Inc.,* 433 F.Supp. 474 (D.D.C. 1977), *appeal docketed,* Nos. 77-1739, 77-1766 (D.C. Cir. Aug. 16, 1977, Aug. 23, 1977), holding §101(a)(4) of the Labor Management Reporting & Disclosure Act, 29 U.S.C. §411(a)(4), which prohibits interested employers from supporting union members' lawsuits against their unions, unconstitutional under the First Amendment when applied to prohibit a right-to-work organization, funded chiefly by contributions from interested employers, from funding union member lawsuits against unions. The court relying in part upon *Buckley* v. *Valeo,* 424 U.S. 1 (1976) held that Congress may not constitutionally restrict the First Amendments rights of such an organization or its contributors.

> [The challenged provision] *clearly, directly, and absolutely* interferes with the first amendment rights of petition, association, and speech of the Foundation and its contributors . . . the first amendment has traditionally been construed strictly in cases involving political expression. 433 F.Supp. at 482.

restrictions are unconstitutional. *C & C Plywood Corp.* v. *Hanson,* 420 F.Supp. 1254 (D.Mont. 1976), *appeal docketed,* No. 76-3118 (9th Cir. September 29, 1976); *Pacific Gas & Electric Co.* v. *Berkeley,* 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976); *Citizens for Jobs and Energy, Inc.* v. *Fair Political Comm'n,* 16 Cal. 3d 671, 547 P.2d 1386 (1976); *Advisory Opinion 1975 PA 227,* 396 Mich. 465, 242 N.W.2d 3 (1976). The Supreme Judicial Court found *Buckley* to be irrelevant (J.S. App. 10-11) and upheld the prohibition.

III. Conclusion

Appellants urge the Court to enter one or more of the decrees suggested at pp. 87-88 of their main brief.

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No. 76-1172

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE FIRST NATIONAL BANK OF BOSTON, NEW ENGLAND MERCHANTS NATIONAL BANK, THE GILLETTE COMPANY, DIGITAL EQUIPMENT CORPORATION, AND WYMAN-GORDON COMPANY, APPELLANTS

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL, APPELLEE

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF THE FEDERAL ELECTION COMMISSION, AMICUS CURIAE

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BRIEF OF THE FEDERAL ELECTION COMMISSION, AMICUS CURIAE

STATEMENT OF INTEREST

The Federal Election Commission has primary jurisdiction over the administration and enforcement of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.*, ("the Act"). (Pub. L. No. 92-225, 86 Stat. 3 (1972); Pub. L. 93-443, 88 Stat. 1263 (1975); Pub. L. No. 94-283, 90 Stat. 475 (1976)). The Commission is authorized to appear in and defend against actions with regard to the administration and enforcement of that Act, as well as

the related provisions of the Internal Revenue Code (Title 26 U.S.C., Chapters 95 and 96). 2 U.S.C. §§ 437d(a)(6), 437h; 26 U.S.C. §§ 9010, 9040. This brief is submitted pursuant to Supreme Court Rule 42(4).

The Federal Election Campaign Act makes it " . . . unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office . . . or for any corporation whatever, or any labor organization to make an expenditure in connection with any election . . ." to any federal office. 2 U.S.C. § 441b. The Massachusetts statute challenged by appellants contains similar restrictions, not directly at issue in this case, which state that no corporation "shall directly or indirectly give, pay, expend or contribute or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office . . ." (Mass. Gen. Law, C.55, Sec. 8).

The Commission's interest in this case extends to its impact on the constitutionality of the statute within its jurisdiction. The Commission is given substantial powers to structure resolution of questions concerning the application of the federal statute to the diverse factual and legal questions raised by its provisions. See, generally, 2 U.S.C. Secs. 437c, 437d. The Commission is authorized to bring actions to construe the constitutionality of statutory provisions under its jurisdiction. 2 U.S.C. § 437h; 26 U.S.C. § 9011

(b). The Commission can give advisory opinions on the application of the law to specific facts. 2 U.S.C. § 437f. Where events afford it reason to believe that the Act may have been violated, the Commission has power to reach a voluntary resolution of such matters, either because a person demonstrates that no action should be taken (2 U.S.C. § 437g(a)(4)) or because an agreement reached as a result of the statute's command "to correct or prevent such violation by informal methods of conference, conciliation and persuasion," permits resolution of questions raised (2 U.S.C. § 437g(a)(5)). Provisions of the Act can only be enforced through the courts (2 U.S.C. § 437g(a)(5)); Commission decisions not to take enforcement action are also reviewable by direct action in the courts (2 U.S.C. § 437g(a)(9)).

Acceptance of appellant's broad statements of the extent and nature of the rights of corporations under the first amendment to the United States Constitution would, however, affect judgments on similar issues under the provisions of the Act.[1] Declination by this Court of the broad arguments advanced by appellants would serve to elucidate the balance of the rights of individuals within a corporation, of the material inter-

[1] Appellants apparently concede (Appellants' Brief, p. 36, n. 17) that the resolution of this case on the merits need not necessarily affect judgment on the issues presented under the Act. As to the justiciability of the particular statutory provisions in the absence of a concrete factual record to which the statute has been applied, or the mootness of the present action, the Commission expresses no opinion as such questions relate to the operation of the particular Massachusetts statutory provisions.

ests of the corporation and of the public interest in an electoral system free of improper influences, in specific factual contexts with their attendant sharpening of the choices posed by particular resolutions. Accordingly, the Commission urges the Court, if it concludes that it has present jurisdiction over this action, to reject appellants' broad claims and to restrict any decision to the facts of the case before it.

ARGUMENT

I. THIS COURT SHOULD REJECT APPELLANT'S ARGUMENT THAT EXPENDITURE OF FUNDS BY CORPORATIONS IN CONNECTION WITH ELECTIONS IS PROTECTED FROM REGULATION BY THE FIRST AMENDMENTS TO THE UNITED STATES CONSTITUTION.

It cannot be maintained as a historical proposition that corporations of every kind are accorded as a matter of constitutional right all of the protections afforded to natural persons by the Constitution. *Dartmouth College* v. *Woodward,* 17 U.S. (4 Wheat.) 518, 561 (1819); *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535 (1925) Rather, the Constitution has always been read to afford to corporations constitutional protections only as they relate to the protection of their interests. See, e.g., *Doran* v. *Salem Inn, Inc.,* 422 U.S. 922 (1975); *Southwestern Promotions, Ltd.,* v. *Conrad,* 420 U.S. 546 (1975); *New York Times* Co. v. *Sullivan,* 376 U.S. 254 (1964); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952); *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936). Corporations have not been permitted to avail themselves of many of the constitutional protections, particularly with respect to the personal freedoms, such as self-incrimination. *Hale* v. *Henkel,* 201 U.S. 43, 74–75 (1906); *California Bankers Ass'n.* v. *Shultz,* 416 U.S. 21, 55, 71 (1974). Corporations do not possess "liberty" rights guaranteed by the fourteenth amendment to natural persons. *Western Turf Ass'n.* v. *Greenburg,* 204 U.S. 359, 363 (1907); *Northwestern Life Ins. Co.* v. *Riggs,* 203 U.S. 243 (1906). Nor are they citizens within the meaning of the privileges and immunities clause of the fourteenth amendment. *Hague* v. *CIO,* 307 U.S. 496 (1939); *Hemphill* v. *Orloff,* 277 U.S. 537 (1928); *Asbury Hospital* v. *Cass County,* 327 U.S. 207 (1945). There is no corporate privilege against self-incrimination, (*United States* v. *White,* 322 U.S. 694 (1944); *Wilson* v. *United States,* 211 U.S. (1911)), nor to rights of privacy, (*United States* v. *Morton Salt,* 338 U.S. 632, 651–652 (1950).

Appellants bold assertion that corporations have an unabridgeable right to expend money for political purposes asks this Court to conclude that the first amendment does not distinguish between citizens and artificial entities themselves incorporated by the government.[2] Yet this Court has long emphasized the personal nature of both first amendment guarantees and the electoral rights which they protect. The annals of this Court abound with decisions emphasizing

[2] In view of the Court's holding that the fourteenth amendment makes the first amendment applicable to action by states, the issues are considered as direct first amendment problems. See, *Bigelow* v. *Virginia,* 421 U.S. 809, 811 (1975).

that the first amendment stakes out an area of personal freedom for citizens on which the government can neither make, nor brook, interference, except where the most compelling circumstances prevail. See, e.g., *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976); *Abood* v. *Detroit Board of Education*, — U.S. —, 45 U.S.L.W. 4473, 4480. The right to associate for political purposes is preeminently an individual right. "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957). "We require only that the rights of every citizen to believe as he will and to act and associate according to his beliefs be free to continue as well." *Elrod* v. *Burns*, 427 U.S. 347, 372 (1976). See, also, *Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975). The most personal right protected by the Constitution, not extended to corporations, is the right to vote. "Citizens, not history or economic interests, cast votes." *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964). See also, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964). Voting is the "fundamental political right, because preservative of all rights," *Yick Wo* v. *Hopkins*, 118 U.S. 356, 379 (1885).

Appellants seek support for their claim of direct first amendment rights for corporations in this Court's decisions that corporations whose existence involves the exercise of activities protected by the first amendment have standing to assert them. Ignoring the constitutional exception which frees the institutional

press from government control, appellants insist that decisions which establish that the first amendment's protection for freedom of the press extends to corporations in the business of communications suggest that incorporation itself brings with it first amendment rights. Each of the cited decisions emphasizes, however, the special role of the press in our system of freedom of expression. Appellants heavy reliance on *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936) exemplifies the short reach of the decisions cited. Specifically reaffirming the validity of general taxes, this Court found a special tax on newspapers which had "a long history of hostile misuse against the freedom of the press" to be a "deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees." 297 U.S. at 250. See, *Associated Press* v. *United States*, 326 U.S. 1 (1945). Appellants citation of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) seems similarly inapposite, since the foundation of that decision's elaboration of traditional libel tests was precisely the importance of the role of a free press in fostering robust and uninhibited debate. 376 U.S. at 270.[3] Finally, this

[3] *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 390 (1969), makes clear that it is not corporate rights but the balance of public interests, varying with the medium of expression, which controls: "But the people as a whole retain the interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." 395 U.S. at 390. That decision

Court, in holding that an incorporated association has standing to assert rights of association to secure legal redress for constitutional rights, expressly limited the decision to corporations whose very activity was the furthering of such association:

> We think petitioner may assert this right on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail. *NAACP* v. *Button*, 371 U.S. 415, 428 (1963).

In effect, appellants rely upon the undoubted ability of citizens to pool their financial resources to battle for political and social goals to argue that all corporations must be deemed substantially equivalent to such traditional voluntary associations. That, however, ignores the substantially different purposes for which corporations generally exist, and the paramount influence that that has upon the rights which flow to them. This Court has long emphasized that the character of the corporation measures the protections afforded it: "Being a mere creature of law it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Dartmouth College* v. *Woodward*, 17 U.S. at 636. "Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the fourteenth amendment guarantees. Accepted in the proper sense, this is true . . . [citations omitted]. But they have business and property for which they claim protection." *Pierce* v. *Society of Sisters*, 268 U.S. at 535. ". . . corporations can claim no equality with individuals in the employment of a right of privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities." *United States* v. *Morton Salt Co.*, 338 U.S. at 651–652. See, also, *California Bankers Ass'n.* v. *Schultz*, 416 U.S. at 65; *Hemphill* v. *Orloff*, 277 U.S. at 550; *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 536 (1922).

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reaffirmed, therefore, with specific reference to the electronic media, the basic idea set forth as to more traditional press media in cases such as *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952) and *Kingsley International Pictures* v. *Regents*, 360 U.S. 684 (1959), cited by appellants. See, also, *Virginia Pharmacy Board* v. *Virginia Citizens Council*, 425 U.S. 748, 761–765 (1976).

Appellants' attempt to extend first amendment protections to all business corporations as a matter of right should be rejected by the Court. The holdings that the interest of the corporation defines its protection rest on the recognition that corporations are subject to an entirely different form of regulation, appropriate to their unique and powerful role in the control of the economic wealth of our society. That the same rights guaranteed to individuals are often applicable to corporations should not allow corporations to rely upon rights particularly guaranteed to individuals.

II. ANY INTEREST IN CONTRIBUTIONS AND EXPENDITURES BY CORPORATIONS IN CONNECTION WITH ELECTIONS IS OUTWEIGHED BY THE IMPORTANT POLICIES OF PROTECTION OF ELECTIONS FROM EITHER THE APPEARANCE OR THE ACTUALITY OF UNDUE INFLUENCE OR CORRUPTION AND OF PROTECTION OF NATURAL PERSONS FROM FORCED ASSOCIATION WITH VIEWS NOT THEIR OWN.

This Court has never ruled on the constitutionality of the ban on expenditures and contributions by corporations in connection with federal elections.[4] However, it has long recognized that the prohibitions serve two major purposes: the prevention of undue influence over the electoral process by corporations (and unions) and the protection of stockholders (or union members) who do not wish to contribute to those causes which the organizations have chosen to support. The legitimacy of those aims has frequently been recognized by this Court. See, e.g., *Cort* v. *Ash*, 422 U.S. 66, 80–82 (1975); *Pipefitters Local 562* v. *United States*, 407 U.S. 385, 402, 413–427 (1972); *United States* v. *UAW*, 352 U.S. 567, 593 (1957); *United States* v. *CIO*, 335 U.S. 106, 113–115 (1948). Lower courts which have had occasion to reach the issue have upheld the restrictions for those reasons, expressly ruling them constitutional. *United States* v. *Chestnut*, 533 F. 2d 40, 50, 51 n. 12 (2d Cir. 1976), *cert. den.*, 429 U.S. 829 (1976); *United States* v. *Boyle*, 482 F. 2d 755 (D.C. Cir. 1973), *cert. den.*, 414 U.S. 1076

[4] National banks, subject to direct federal regulation, are also prohibited from such activity in state elections as well. 2 U.S.C. § 441b.

(1973); *United States* v. *Pipefitters Local 562*, 434 F. 2d 1116 (8th Cir. 1970), rev'd on other grounds, 407 U.S. 385 (1972); *Schwartz* v. *Romnes*, 357 F. Supp. 30, 36 (S.D.N.Y. 1973), rev'd on other grounds, 495 F. 2d 844 (2d Cir. 1976); *United States* v. *United States Brewers' Ass'n.*, 239 Fed. 163 (W.D. Pa. 1916).

This Court's considered refusal to issue broad constitutional rulings on the issues arguably posed by these restrictions rests on principles of the highest order in constitutional litigation. On the one hand, Congress has extensive power to regulate federal elections, founded in the express provision of article I, section 4 of the Constitution for elections to Congress and the power implied from article II to regulate presidential elections. *Burroughs & Cannon* v. *United States*, 290 U.S. 534, 545–47 (1934); *Smiley* v. *Holm*, 285 U.S. 355 (1932). See, also, *United States* v. *Mosley*, 238 U.S. 383 (1915); *Ex Parte Yarbrough*, 110 U.S. 651 (1884); *Ex Parte Siebold*, 100 U.S. 371 (1879); *United States* v. *Classic*, 313 U.S. 299 (1941). The Congress has broad latitude in determining the means necessary to those ends. "The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress." *Burroughs & Cannon* v. *United States*, 290 U.S. at 547. See, also, *Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). Nor does that power

extend solely to the protection of the government from the undue influence of particular groups upon its selection and operation. *United States* v. *Harriss,* 347 U.S. 612, 625–626 (1954); *Ex Parte Curtis,* 106 U.S. 371, 373 (1882); *Civil Service Commission* v. *Letter Carriers,* 413 U.S. 548, 564–65 (1973); *Buckley* v. *Valeo,* 424 U.S. at 25–29. Nor need such laws be narrowly drawn, to strike only at actual corruption or undue influence: "Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley* v. *Valeo,* 424 U.S. at 27. In short, the interests of the citizens in protection of the electoral process are of the highest magnitude.

On the other hand, "contribution and expenditure limitations operate in an area of the most fundamental first amendment activities." *Buckley* v. *Valeo,* 424 U.S. at 14. "Speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana,* 379 U.S. 64, 74–75 (1964). See, also, *Board of Education* v. *Barnette,* 319 U.S. 624 (1943); *Elrod* v. *Burns,* 427 U.S. at 372. Free and unfettered discussion of ideas, not readily severable into categories of truth or falsity, belief or fact, constitutes the lifeblood of our constitutional political system: ". . . there is practically universal agreement that a major purpose of that Amendment [the first] was to protect the free discussion of gov-

ernment affairs . . .", *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966). Our society is thus founded on the belief that " . . . the ultimate good desired is better reached by the free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .", *Abrams* v. *United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Where these two great interests of the citizens interact, this Court has stated that it will overturn the Congressional balance only upon a clear showing of interference with protected rights, and will defer its judgments until government authorities seek to bar specific activity. With regard specifically to the federal prohibition on expenditures and contributions by corporations and unions, Mr. Justice Frankfurter, speaking for the Court, warned:

> "Counsel are prone to shape litigation, so far as it is within their control, in order to secure comprehensive rulings. . . . Such desire on their part is not difficult to appreciate. But the Court has its responsibility. Matter now buried under abstract constitutional issues may, by the elucidation of a trial, be brought to the surface, and in the outcome constitutional questions may disappear. Allegations of the indictment hypothetically framed to elicit a ruling from this Court or based upon misunderstanding of the facts may not survive the test of proof." *United States* v. *UAW,* 35 U.S. at 592 (1957).

Due to similar considerations this Court, when the Hatch Act's prohibitions on individual political activity first came before it, declined to declare the Act unconstitutional on allegations of hypothetical first amendment injury comparable to those made here:

> "The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other." *United Public Workers* v. *Mitchell*, 300 U.S. 75, 89–90 (1937) (footnote omitted).

That judicial restraint enabled the Court, when the issues returned to it almost thirty years later, to view the proscriptions in the light of the experience of actual or threatened enforcement of the Act against specific conduct. As the Court then noted:

> "The Commission was to *issue notice, hold hearings, adjudicate, and enforce.* This process, inevitably and predictably, would *entail further development of the law* . . . and would be productive of a more *refined definition* of what conduct would or would not violate the statutory prohibition of taking an active part in political management and political campaigns.
>
> ". . . It is to these regulations purporting to construe § 7324 as *actually applied in practice*, as well as to the statute itself, with its various exclusions, that we address ourselves in rejecting the claim that the Act is unconstitutionally vague and overbroad." (citations omitted, emphasis added)

Civil Service Commission v. *Letter Carriers*, 413 U.S. at 575. See, also, *Longshoremen's Union* v. *Boyd*, 347 U.S. 222, 224 (1954); *South Carolina* v. *Katzenbach*, 383 U.S. at 316–17; *California Bankers Ass'n.* v. *Shultz*, 416 U.S. at 56, 75–76; *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

In essence, this Court's decisions warrant the conclusion that extreme care should be exercised before accepting the conclusion urged by appellants that the legislative balance should be overthrown because none of the interests supporting the statute could warrant the restrictions placed. The amount of evidence considered by Congress in enacting and reenacting these prohibitions has been massive. Congress legislated the initial Federal Corrupt Practices Act on the basis of voluminous evidence of the corrupting influence of corporate contributions. In expanding the prohibition to cover labor unions, even more corroborative evidence came before Congress. See, *United States* v.

CIO, 335 U.S. at 113–115; *Pipefitters Local 562* v. *United States*, 407 U.S. at 402–413. That record expanded further when Congress in the face of substantial evidence regarding the funding of the 1972 elections, reaffirmed the prohibition on expenditures and contributions by corporations and unions.[5]

Nor should this Court conclude that Congress had no reason for its concern that the secondary policy underlying the statute—of protecting the interests of stockholders and corporate officers or agents from forced support of views not their own—could not be achieved without the present prohibitions. This Court has, of course, previously concluded that those interests underlay previous statutes. See, *United States* v.

[5] Even a cursory glance at the legislative history of the 1974 Campaign Act Amendments reveals the depth of Congressional concern with illicit contributions from corporations, their effect upon the legislators, and the growing public disillusionment with the electoral system. See, e.g., Final Report of the Senate Select Comm. on Presidential Campaign Activities, S. Rept. No. 981 93d Cong., 2d Sess. (1974); Hearings before the Senate Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess. (1973); Hearings on a Survey of Public Attitudes before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 93d Cong., 1st Sess. (1973); Hearings on H.R. 7612 and S. 372 before the Subcomm. on Elections of the House Comm. on House Administration, 93d Cong., 1st Sess. (1973); Hearings on S. 372 before the Subcomm. on Communications of the Senate Comm. on Commerce, 93d Cong., 1st Sess. (1973); Hearings on S. 372 before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 93d Cong., 1st Sess. (1973); Hearings on S. 1103 S. 1954, and S. 2417 before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 93d Cong., 1st Sess. (1973); Hearings on S. 3496, Amendment No. 732, S. 2006, S. 2965 and S. 3014 before the Senate Comm. on Finance, 89th Cong., 2d Sess. (1966).

CIO, 335 U.S. at 111–113. *Pipefitters Local 562* v. *United States*, 407 U.S. at 409–410, n. 20. When Congress enacted the 1976 Amendments to the Federal Election Campaign Act, it reacted to this Court's decision in *Pipefitters*, amplifying the statute with a detailed scheme for assuring the voluntary nature of contributions by those individuals to funds separate and segregated from corporate (and union) treasury funds, including specific provisions for veiling the identity of small contributors (and noncontributors). 2 U.S.C. §441b(b)(3) and (4). In the fact of such legislative concern, this Court should not readily conclude that such protection is unnecessary for individuals whose economic well-being can be substantially influenced by the organization. See, *Abood* v. *Detroit Board of Education*, 45 U.S.L.W. at 4480–4481.

Balanced against the considerations in support of these prohibitions are not the interests of natural persons, but the far more restricted rights of corporations. Thus, even assuming, *arguendo*, that corporations have first amendment rights, those rights are clearly subject to restrictions appropriate to corporate existence. Initially, of course, their basic existence is regulated by charter from the government.[6] Although the bulk of corporate law is state law, a survey of federal securities regulations alone is sufficient

[6] See, e.g., R. Barber, *The American Corporation* 19–20 (1970); A. Berle & G. Means, *The Modern Corporation and Private Property* (Rev. ed. 1968); C. Kaysen, *The Corporation in Modern Society* 104 (1959). See, also, Brief of *Amicus*, Chamber of Commerce, pp. 8–10.

to demonstrate the broad regulatory control over corporate affairs, including regulation of corporate speech. See, e.g., provisions of the Securities and Exchange Act of 1934, codified in 15 U.S.C. § 78n (regulation of the content of proxy statements), §78j(b) (prohibition of deceptive statements in connection with any sale of securities), § 78 p (regulation of insider trading). These regulations include restrictions on the content of corporate speech, in matters materially affecting their interests. Tax laws are specially constructed, recognizing the proper classification of corporations for these purposes. See, e.g., *Cammarano* v. *United States*, 358 U.S. 498 (1959) (protected right to lobby not accorded tax protection; 26 U.S.C. § 23 (a)(1)(A)). Similarly, the expression of corporate employees, as well as individuals, can be regulated to protect labor peace and free elections. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969); *NLRB* v. *Virginia Electric Power Co.*, 314 U.S. 469 (1941). And the Federal Trade Commission has the power to impose cease and desist orders restraining unfair methods of competition. 15 U.S.C. § 45(b). See, *New York Times* v. *United States*, 403 U.S. 713, 731 n. 1 (1972) concurring opinion).

No prohibition here appears on individuals from speaking their beliefs; the prohibition is against the use of corporation funds to amplify those statements. Nor does anything in the law prohibit the pooling of resources by individuals whose views coalesce; indeed, the federal law permits such coalescence of voluntary funds under the auspices of corporations and unions.

That money is essential to effective communication does not establish the corollary proposition that money in elections must be unregulated, no matter its source. Business corporations are organized for the purposes of increasing financial gain and furthering the economic interests of their stockholders; attempts to influence the political process are *prima facie* for the purpose of furthering the financial return from their investments and the dangers of a *quid pro quo* arrangement between elected public officials and corporate contributors can be seen as even more compelling than the dangers of the same arrangement between such an official and a private individual.

Appellants' arguments essentially attack legislative judgments about where the appropriate lines should be drawn in balancing these interests. The Federal Election Campaign Act is replete with the Congressional judgment that campaign financing regulation is necessary but that the balance required by the competing interests should be the result of experience with the administration of such laws.[7] Where

[7] The federal statute also directs the Commission to gather and assess the experience gained from the operation of state laws and thus "to serve as a national clearinghouse for information in respect to the administration of elections." 2 U.S.C. § 438(b). State regulation of election campaign laws has proceeded with a variety of limitations; some do not restrict corporate expenditures and contributions, some ban them with regard to ballot issues, some with regard to contributions. See, *Analysis of Federal and State Campaign Finance Law—Quick-Reference Charts—Summaries* (Prepared for the Federal Election Commission under contract by the Library of Congress, American Law Division (Dec. 1976–Jan. 1977) (U.S. Dept. of Commerce, NTIS, PB 265-219, PB 265-220).

no evidence exists to rebut the legislative judgment that such dangers exist, the hypothetical fear of deprivation of the rights of citizens to hear diverse viewpoints should not overturn the considered legislative judgments without further factual consideration of the legislative prohibition.[8]

CONCLUSION

If the Court concludes that it has jurisdiction over this matter, it should affirm the judgment of the court below.

Respectfully submitted.

WILLIAM C. OLDAKER,
General Counsel.

CHARLES N. STEELE,
Associate General Counsel.

[8] While the Commission takes no position on the overbreadth or vagueness arguments as to this particular statute, the argument that adjudication over factual issues will best illuminate the constitutional questions subsumes much of them; overbreadth and vagueness in the clash of the electoral and political interests involved can best be resolved and balanced on the basis of the statute as applied in practice. That logic leads to the conclusion that the Court should reject appellants' attempt to have the statute declared unconstitutional even before it is applied to them. See, also, *Bates* v. *State Bar of Arizona*, 45 U.S.L.W. 4895, 4903 (June 27, 1977).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION
and
WYMAN-GORDON COMPANY,
Appellants

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL
Appellee

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

The Chamber of Commerce of the United States of America hereby moves, pursuant to Supreme Court Rule 42, for leave to file a brief *amicus curiae* in support of Appellants. This motion is necessitated by the

refusal of the Appellee to consent to the filing of the appended brief.[1]

The interest of the *amicus curiae,* the Chamber of Commerce of the United States of America, is set forth in detail in its brief. To summarize, the Chamber of Commerce is the largest business federation in the United States, representing both large and small business organizations, as well as businessmen and women, throughout the United States, including the Commonwealth of Massachusetts.

The determination of the Supreme Judicial Court of Massachusetts that corporations possess, at best, limited First Amendment rights, if permitted to stand, will affect corporations throughout the country. The interest of the Chamber of Commerce and its members is rooted in the potential impact of this case as a precedent which will affect their ability to communicate on issues of vital concern to the Nation, their respective States and localities.

This case raises the fundamental issue of the right of business organizations and their employees to express their views on issues of importance to them. The decision below also intimately involves the right of the public to receive a multitude of views, including those of corporations and business persons, on public issues.

As *amicus curiae* the Chamber of Commerce is in a unique position to articulate the views of the business community on these matters of fundamental concern. Because the case is national in its ramifications, we respectfully submit that the views of a national organization, the Chamber of Commerce, are appropriate for consideration by this Court.

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[1] Appellants have consented, pursuant to Supreme Court Rule 42.

For these reasons, it is respectfully requested that the motion of the Chamber of Commerce of the United States of America for leave to file a brief *amicus curiae* in support of Appellants be granted.

Respectfully submitted,

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June 2, 1977

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THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION

and

WYMAN-GORDON COMPANY,
Appellants

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL
Appellee

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America [hereafter the Chamber] is a nonprofit corporation organized and existing under the laws of the District of Columbia, with its principal office at 1615 H Street, N.W., Washington, D.C. 20062.

The Chamber is the largest business federation in the United States, with a total membership in excess of 65,000 enterprises and organizations representing businessmen and women throughout the United States, including the Commonwealth of Massachusetts. More than 3700 state and local chambers of commerce and trade associations are members. Direct business memberships number in excess of 62,000, the overwhelming majority of which are corporations.

The interest of the Chamber and its members is rooted in the potential impact of this case as a precedent which will determine their ability to speak freely on issues of vital concern to the Nation, their respective States and localities. The Board of Directors of the Chamber have long recognized that business leaders have the obligation, *inter alia:*

> To guard against unjustifiable restraint, direct or indirect, upon the free and frank expression of opinion on public issues by business and businessmen.
>
> To recognize social as well as economic obligations and to accept the assumption of leadership in meeting the problems and needs of the community.
>
> POLICY DECLARATIONS *Adopted by the Chamber of Commerce of the United States of America,* (October 1975 ed.) at 12.

Thus, the Chamber and its members are involved in a wide range of activities, such as delivering speeches, publishing pamphlets and books, and conducting seminars, which directly involve the discussion of government affairs. To the extent that this case questions

the right of corporations to be heard on public issues, it goes to the heart of both the Chamber's own operations and those of its members.

The determination of the Supreme Judicial Court of Massachusetts that corporations possess, at best, limited First Amendment rights, if permitted to stand, will serve as a precedent to prohibit corporate free speech throughout the country. Thus, this case squarely presents to the Court the issue of the First Amendment rights of corporations to speak out on issues of public concern to the community in which they are located.

This case directly involves the right of corporations "to expend monies to publicize by paid advertisements in newspapers and other media, their contentions with respect to the graduated income tax and the proposed Constitutional Amendment in an attempt to persuade the voters of Massachusetts to defeat the proposed Constitutional Amendment at the general election." (App. F at 28). At issue is also the right of corporate employees to speak out on matters of public concern, at corporate expense. *Ibid.* And ultimately, this case involves the right of individuals to receive communications which set forth a particular point of view on a matter which requires the citizens of the Commonwealth of Massachusetts to amend their Constitution.

Mass. Gen. Laws ch. 55, § 8 operates to limit the subject matter of corporate speech and thus imposes an absolute bar upon free and unfettered speech:

> . . . no business corporation . . . shall directly or indirectly give, pay, expend or contribute . . . any money or other valuable thing for the purpose of . . . influencing or affecting the vote on any ques-

> tion submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

Thus, in an area where "[t]here is a division of opinion among economists as to whether and to what extent a graduated income tax imposed solely on individuals would affect the business and assets of corporations" (App. F at 33), Massachusetts would bar discussion of the issue by a business corporation, but not by any other person, group or organization which desires to speak out on this matter.

The Chamber, as *amicus curiae,* takes no position on the issue of whether a graduated income tax proposal should be adopted in the Commonwealth of Massachusetts. Rather, the Chamber's interest is that all points of view, including those of incorporated enterprises, be presented to the public on this important matter—so that, ultimately, the free, frank, and robust expression of public opinion on issues may be expressed by business organizations, businessmen and businesswomen, as guaranteed by the First Amendment.

ARGUMENT

Over half a century ago, Mr. Justice Holmes conceded that the United States would not come to an end if the Supreme Court lost its power to declare an Act of Congress void. But he cautioned: "The Union would be imperiled if [the Court] could not make that declaration as to the laws of the several States." Holmes, *Law in the Court*, collected in Speeches by

Oliver Wendell Holmes 98, 102 (1913). Few cases in recent memory have so dramatized the wisdom of this observation as does the case at bar.

In its decision below, the Supreme Judicial Court of Massachusetts upheld the constitutionality of chapter 55, section 8 of the Massachusetts General Laws.[1] In essence, that statute makes it a criminal offense for a business corporation to expend any monies to promulgate its views on any question—no matter how urgent or how important the question may be to the public weal—if that question is pending before the Massachusetts electorate, unless the question "materially affect[s] the property or assets of the corporation."[2]

To fully appreciate the profound threat to cherished First Amendment liberties posed by the opinion below, it is necessary to consider the purposes subserved by the First Amendment and the role that the Amendment plays in our scheme of government.

To the Founders of our Republic, repression of thought and speech were vivid and portentious evils. Indeed, history bore witness to the awful truth that

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[1] Massachusetts General Law, ch. 55, § 8 provides, in pertinent part, that: ". . . no business corporation . . . shall directly or indirectly give, pay, expend or contribute . . . any money or other valuable thing for the purpose of . . . influencing or affecting the vote on any qu stion submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transaction of individuals shall be deemed materially to affect the property, business, or assets of the corporation."

[2] The decision below is contrary to *C. & C. Plywood Corp.* v. *Hanson*, 420 F. Supp. 1254 (D. Mt. 1976) and *Pacific Gas and Electric Co.* v. *Berkeley*, 131 Cal. Rptr. 350 (1976).

those societies which found it expedient to stifle criticism and persecute the expression of opinion had suffered first, ennui, and then total decay.[3]

Sensitive to the disquieting reminders of history, the Founders fashioned the First Amendment primarily to ensure the unfettered interchange of ideas for the bringing about of political and social changes.[4]

Indeed, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussion of candidates, structures and forms of government, the manner in which government is operated or should

[3] C. H. Lansky, The Grammar of Politics 120-121 (3rd ed. 1934).

[4] *See generally, Buckley* v. *Valeo*, 424 U.S. 1, 49 (1976); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-763 (1972); *Police Department* v. *Mosley*, 408 U.S. 92 (1972); *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972); *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 271-72 (1971); *Greenbelt Cooperative Publishing Association, Inc.* v. *Bresler*, 398 U.S. 611 (1970); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969); *Watts* v. *United States*, 394 U.S. 705, 708 (1969); *Pickering* v. *Board of Education*, 391 U.S. 563, 573 (1968); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967); *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966); *Rosenblatt* v. *Baer*, 383 U.S. 75, 85-86 (1966); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964); *Edwards* v. *South Carolina*, 372 U.S. 229, 237-238 (1963); *NAACP* v. *Button*, 371 U.S. 415, 429 (1963); *Thornhill* v. *Alabama*, 310 U.S. 88, 101 (1940). *See also* Meikeljohn, Political Freedom: The Constitutional Powers of the People 75 (1960). Of course, the First Amendment "does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with small ones, are guarded. The grievances for redress are not solely religious or political ones. And the rights of free speech . . . are not confined to any field of human interest.'" *United Mineworkers* v. *Illinois State Bar Association*, 389 U.S. 217, 223 (1967).

be operated, and all such matters relating to political processes." *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966).

Such an expansive interpretation of the First Amendment is mandated by the very nature of our constitutional democracy which presupposes and requires the active participation of an enlightened and informed electorate.[5] Thus, "a broad conception of the First Amendment is necessary to supply the *public need* for information and education with respect to the significant issues of the times. [footnote omitted] . . . Freedom of discussion, if it would fulfill its historic function in this Nation, *must embrace all issues* about which information is needed or appropriate *to enable the members of society to cope with the exigencies of their period.*'" *Wood* v. *Georgia*, 370 U.S. 375, 388 (1962) (emphasis supplied). *See also, Buckley* v. *Valeo*, 424 U.S. 1, 49 (1976).

Apart from indiscriminately trenching upon the acknowledged First Amendment rights of corporations,[6] the essential vice of section 8's virtually all-encompassing prohibition on corporate speech is that it

[5] *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring). *Cf., Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). ("Public discussion is a political duty.")

[6] *See also, Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961); *United States* v. *CIO*, 335 U.S. 106, 154-155 (1948) (Rutledge, J., concurring); *Grosjean* v. *American Press Co., Inc.*, 297 U.S. 233, 244 (1936); *Schwartz* v. *Romnes*, 495 F.2d 844, 852 (2d Cir. 1974); Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U.CHI. L. REV. 148, 151-52 (1974); 122 Cong. Rec. 3677-78 (remarks by Sen. Cannon) (March 17, 1976).

deprives the electorate of a vital source of information precisely at a time when such information is most needed if the electorate is to make reasoned and rational judgments. *Cf., Mills* v. *Alabama,* 384 U.S. 214 (1966).[7]

The Attorney General of Massachusetts surely cannot be heard to argue that section 8's prohibition on corporate speech has no more than a *de minimus* effect on the dissemination of vital information to our people. Indeed, such an argument is manifestly unacceptable in light of the dominant role corporations play in the functioning of our Nation.

Of relatively recent growth, the corporation has become almost the unit of organization of our economic life. "Whether for good or ill, the stubborn fact is that in our present system the corporation carries on the bulk of production and transportation, is the chief employer of both labor and capital, pays a large part of our taxes, and is an economic institution of such magnitude and importance that there is no present

[7] Corporations, like individuals, are not homogeneous. Some corporations are multinational enterprises, the stock of which is publicly held and traded while others are medium-sized public companies; many are closed, closely held corporations controlled by an individual or family. The categorical prohibition upon corporate speech of the type imposed by the statute in question here best serves to limit the speech not only of the corporate official who speaks on behalf of the corporate entity, but also of the small businessman who, for personal reasons, has chosen to incorporate. The use by such individuals of corporate funds—which in a very real sense are their only assets—to express an opinion on a matter of public concern is also prohibited by the statute at issue. In short, the prohibition embodied in Section 8 applies with equal force to the incorporated corner drugstore as it does to a financial institution or major manufacturing facility. The statute is drafted as though all corporations were industrial giants.

substitute for it except the state itself." *Tax Commission* v. *Aldrich,* 316 U.S. 174, 192 (1942) (Jackson, J., dissenting).[8] Thus, the prohibition upon certain forms of corporate speech upheld by the court below threatens to have a substantial nationwide impact.

Apace with the burgeoning growth of corporations has come the heightened recognition that corporations have responsibilities to the society in which they function and from which they draw their sustenance. *See, D. Linowes,* "The Corporate Social Audit," in Social Responsibility and Accountability 93 (1975); C. Madden, Clash of Culture: Management in an Age of Changing Values 74 (1972); K. Davis and R. Blomstrom, Business, Society and Environment: Social Power and Social Response 413 (3rd ed. 1975). In order that corporations can effectively carry out these responsibilities, they must be able to communicate with the citizenry at large:

> Freedom of the press and other mass communications is not an end in itself but it is a means to an end of a free society. Obviously, mass communication is not set up simply for the profit of business. Business's social role is to provide the people a valuable service which helps maintain their freedoms. Davis and Blomstrom, *supra* at 413.

The statute at issue prevents the modern corporation from fulfilling a major social obligation to the

[8] The IRS estimates that in 1975, 588,133 small business corporations filed tax returns. Internal Revenue Service Preliminary Report, Statistics of Income—1975 Individual Tax Returns 19, Pub. No. 198 (2-77) (1977). Other statistical surveys estimate the total number of corporations in the United States as of 1973 at 1,905,000. Statistical Abstract of the United States 507 (9th ed. 1976).

public by cutting off an important avenue of communication: It forbids corporations from speaking out on all ballot issues save those directly and materially affecting the assets or property of the corporation. Additionally, by prohibiting corporate speech, section 8 will often deprive the electorate of one of the most knowledgeable and uniquely qualified sources of information. *See, Pacific Gas & Electric Co.* v. *Berkeley,* 131 Cal. Rptr. 350, 353 (1976). *Compare, Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242, 258 (7th Cir. 1975).

An apparent justification for section 8's sweeping prohibition of corporate speech is the notion that such a prohibition is necessary to insure that corporations do not have a disproportionate voice on ballot issues, thereby over-awing the voters. Section 8's paternalistic prohibition of corporate speech demeans the very foundations on which our society rests. "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political . . . truth." *Wood* v. *Georgia,* 370 U.S. 375, 388 (1962), citing *Thornhill* v. *Alabama,* 310 U.S. 88, 95 (1940).

Only last term this Court held that "democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate . . . issues." *Buckley* v. *Valeo,* 424 U.S. 1, 49 (1976). Indeed, the "most complete exercise ot [First Amendment] rights is essential to the full, fair and untrammelled operation of the electoral process." *United States* v. *CIO,* 335 U.S. 106, 144 (1948) (Rutledge, J. concurring). In sum, the evil sought to be remedied by section 8 (i.e., the promulgation of ideas) is "precisely one of the types of activity envisioned by the Founders

in presenting the First Amendment for ratification." *Wood* v. *Georgia, supra.*[9]

CONCLUSION

For the foregoing reasons, the decision of the Supreme Judicial Court of Massachusetts should be reversed.

Respectfully submitted,

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[9] A second justification for the statute in question was found by the Court below to be a legislative desire to protect shareholders of business corporations against *ultra-vires* activities and unnecessary expenditures. (App. A at 22). For the reasons so cogently set forth in the Appellants' Jurisdictional Statement, this is not a sufficiently compelling reason to justify section 8's broad interference with free speech.

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THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION,
and
WYMAN-GORDON COMPANY,
Appellants,

v.

FRANCIS X. BELLOTTI, Attorney General, *Appellee.*

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF AMICI CURIAE NORTHEASTERN LEGAL FOUNDATION AND MID-AMERICA LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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and

WYMAN-GORDON COMPANY,
Appellants,

v.

FRANCIS X. BELLOTTI, Attorney General, *Appellee.*

MOTION OF NORTHEASTERN LEGAL FOUNDATION AND MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Northeastern Legal Foundation ("NLF") and Mid-America Legal Foundation ("MALF") respectfully move for leave to file the attached brief *amici curiae* in this case. Additionally, leave is requested to file the attached brief out of time. NLF and MALF are authorized to state that the Appellants, and the Appellee,

Francis X. Bellotti, assent to the filing of this motion for leave at this time.

NLF and MALF ("Amici") are not-for-profit corporations organized under the laws of Massachusetts and Ilinois, respectively. They were formed to engage, on a politically non-partisan basis, in legal research, study and analysis of the evolving concepts of law on democratic institutions for the benefit of the general public. NLF and MALF seek to represent the public interest in administrative and judicial matters before state and federal authorities. While the interests of NLF and MALF are national in scope, NLF takes a special interest in questions of law which may have a direct effect on the New England region, including Massachusetts.

As public interest organizations with a central concern for the free flow of information to the public, Amici believe that they can provide this Court with additional perspectives on the issues raised in this case.

NLF and MALF consider this case to be of singular importance. It is well established in decisions of this Court that all persons are entitled to exercise their constitutional rights of free speech and association, subject only to those restraints which can be justified by a compelling state interest. The decision of the Supreme Judicial Court of the Commonwealth of Massachusetts, in excepting corporate persons, is wholly inconsistent with this Court's efforts to ensure robust and wide-open debate on political matters and to facilitate the public availability of all viewpoints necessary to make an informed choice on matters of general concern. Acceptance of the novel views of the state court on the constitutional rights of corporate speakers will sub-

stantially diminish the freedoms of not only the individual appellant corporations but all corporate organizations including those of a not-for-profit, public interest or charitable nature, such as Amici.

Furthermore, the sweep of this case, if sustained, has ominous implications for the rights of unincorporated organizations—e.g. labor unions, public interest groups, consumer groups, and the like—to be heard on public issues. The lessons of history tell us that when a fundamental right is taken from one group in society, that right will not be long enjoyed by others; the type of limitation here before us will soon extend itself to others if allowed to stand at all.

The brief *amici curiae* to which this motion is directed sets forth these points in detail and will, we believe, materially assist the Court in appreciating the full impact of the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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FRANCIS X. BELLOTTI, Attorney General, *Appellee.*

BRIEF OF AMICI CURIAE NORTHEASTERN LEGAL FOUNDATION AND MID-AMERICA LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

Northeastern Legal Foundation ("NLF") and Mid-America Legal Foundation ("MALF") submit this brief as *amici curiae* in support of Appellants in this case. A motion for leave to file this brief as *amici curiae* is submitted simultaneously with this brief.

THE AMICI AND THEIR INTERESTS

NLF and MALF ("Amici") are not-for-profit corporations organized under the laws of Massachusetts and Illinois, respectively. They were formed to engage, on a politically non-partisan basis, in legal research,

study and analysis of the evolving concepts of law on democratic institutions for the benefit of the general public. NLF and MALF seek to represent the public interest in administrative and judicial matters before state and federal authorities. While the interests of NLF and MALF are national in scope, NLF takes a special interest in questions of law which may have a direct effect on the New England region, including Massachusetts.

As public interest organizations with a central concern for the free flow of information to the public, Amici believe that they can provide this Court with additional perspectives on the issues raised in this case.

NLF and MALF consider this case to be of singular importance. It is well established in decisions of this Court that all persons are entitled to exercise their constitutional rights of free speech and association, subject only to those restraints which can be justified by a compelling state interest. The decision of the Supreme Judicial Court of the Commonwealth of Massachusetts, in excepting corporate persons, is wholly inconsistent with this Court's efforts to ensure robust and wide-open debate on political matters and to facilitate the public availability of all viewpoints necessary to make an informed choice on matters of general concern. Acceptance of the novel views of the state court on the constitutional rights of corporate speakers will substantially diminish the freedoms of not only the individual appellant corporations but all corporate organizations, including those of a not-for-profit, public interest or charitable nature, such as Amici.

Furthermore, the sweep of this case, if sustained, has ominous implications for the rights of unincorporated

organizations—e.g. labor unions, public interest groups, consumer groups, and the like—to be heard on public issues. The lessons of history tell us that when a fundamental right is taken from one group in society, that right will not be long enjoyed by others; the type of limitation here before us will soon extend itself to others if allowed to stand at all.

OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts in *The First National Bank of Boston, et al.* v. *Attorney General, et al.*, is reported at 359 N.E.2d 1262 (1977).

STATEMENT OF THE CASE

At issue here is the validity of a Massachusetts statute which forbids business corporations from expending money to communicate their views to the public on state ballot questions not "materially affecting" their "property, business or assets." MASS. GEN. LAWS c. 55, § 8 (the "Massachusetts statute" or "statute"). The statute places a specific prohibition on corporate expenditures to address ballot questions solely concerning the taxation of individuals, by stating that such questions are deemed not "materially to affect" corporate business. Appellants were barred by these statutory provisions from expending any money in opposition to a graduated income tax referendum recently submitted to Massachusetts voters.

NLF and MALF adopt the statement of the case set forth in Appellants' brief.

SUMMARY OF ARGUMENT

I. The First Amendment protects both the speaker's right to speak and the listener's right to hear. By upholding the Massachusetts statute here challenged, the court below allows the state to deny corporations the opportunity to speak out on matters of general public interest and denies the public the opportunity to be fully informed.

II. The First Amendment protects the right of persons, including corporations, to associate in the furtherance of common goals. By upholding the Massachusetts statute here challenged, the court below allows the state to infringe on protected associational rights.

III. Adoption of the rationale of the court below will facilitate state legislative measures designed to restrict the freedom of speech and associational rights of business corporations as well as other associations that wish to express views on matters of general public interest.

IV. This case is not moot.

ARGUMENT

I. The Massachusetts Statute Here Challenged Violates Appellants' Constitutional Right to Freedom of Speech and the Public's Constitutional Right To Be Fully Informed on All Matters of General Interest.

The constitutional infirmities of the Massachusetts statute are three-fold. It unjustifiably restricts the right of one class of speakers—corporations—to contribute to public debate. It limits the right of the public to receive information. And it grounds this restrictions on the content of corporate speech. Although the legislative prohibitions are directed only toward expen-

ditures of money, this Court has recognized that such limitations directly reduce the extent of expression; effective political speech virtually requires use of expensive media and other forms of communication. *Buckley* v. *Valeo*, 424 U.S. 1, 19 (1976). Spending limitations of the kind adopted by the Massachusetts legislature, therefore, may only be sustained if they avoid suppression of protected communication.

Two of the governing principles in First Amendment analysis are the commitment of this Court to a free flow of information, regardless of the character of the speaker, and reliance on the "marketplace of ideas," not legislative determinations, to decide which viewpoint shall prevail. As Mr. Justice Brandeis eloquently stated:

> "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Robust and wide-open debate necessitates participation by all interested parties, regardless of their affiliations, as this Court confirmed recently in its decision in *City of Madison* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 175-76 (1976):

> "[T]he participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees."

There is no constitutional basis for treating corporate organizations as worthy of lesser protection than other associational groups or individuals. The principle that First Amendment rights are not diminished by the corporate character of the speaker is clearly established by a series of recent decisions in which this Court rejected government-imposed limitations on commercial speech. Specifically, in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and more recently in *Linmark Associates, Inc.* v. *Township of Willingboro*, — U.S. —, 45 U.S.L.W. 4441 (May 2, 1977), this Court recognized that the First Amendment serves to protect both the speaker's right to speak and the listener's right to hear, even where a corporation is only disseminating information about products or services. In upholding the Massachusetts statute here challenged, the court below effectively denied interested corporations any opportunity to participate in public debate to which they could make a material and valuable contribution and denied Massachusetts residents the opportunity to be fully informed on a vital political issue.

Although the legislature has focused its attention primarily on corporate participation in debates on issues presented to voters in referenda, similar restrictions could easily be imposed regarding other political and social issues in whatever context they become matters of public concern. Many questions of public policy affect business interests indirectly as well as directly and are certainly an appropriate area for comment by the corporate community.

Additionally, the limitations contained in the Massachusetts statute are directed at the content of the communication. The legislature has drawn the line between permissible and impermissible speech on the basis of the nexus between the issue presented to the voters and the business interests of the speaker. This standard necessarily permits corporate speech on certain topics, but not others, and, therefore, operates as a direct restraint on content. Regulation based on content raises serious constitutional questions:

> "[G]overmental bodies may not prescribe the form or content of individual expression." *Cohen* v. *California*, 403 U.S. 15, 24 (1971).

In *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972), this Court reaffirmed this proposition, stating that:

> "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

The Massachusetts legislature overstepped these bounds in enacting the statute at issue here.

The First Amendment has its fullest application where political questions are in debate. The expression of all views regarding general political issues should enjoy the same constitutional protection, without regard to essentially fortuitous factors such as the speaker's organizational structure.

II. The Massachusetts Statute Here Challenged Constitutes a Significant Restraint on Appellants' Constitutional Right of Free Association.

Restrictions or prohibitions on the right of business corporations to engage in political debate infringe on associational rights. It is clear that the right of persons to associate in the furtherance of common goals

is protected by the First Amendment. Although not set out specifically in the Constitution, this Court has found the right of association to be implicit in the rights of speech, assembly and petition which are expressly protected by the First Amendment. *Healy* v. *James,* 408 U.S. 169, 181 (1972). Indeed, freedom of association is closely allied to freedom of speech and, like free speech, has been said to lie "... at the foundation of a free society." *Shelton* v. *Tucker,* 364 U.S. 479, 486 (1960). This right is particularly critical in the area of public debate on political or other issues of general importance because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP* v. *Alabama,* 357 U.S. 449, 460 (1958). Freedom of association is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the states. *Bates* v. *City of Little Rock,* 361 U.S. 516, 523 (1960).

To infringe upon constitutionally protected rights, a statutory restriction need not impose a total restraint upon the freedom of an organization's members to associate with one another. It is sufficient for the statute to constitute a "substantial restraint" or a "significant interference" with associational rights. *Kusper* v. *Pontikes,* 414 U.S. 51, 58 (1973). Such freedoms ". . . are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates* v. *City of Little Rock, supra.*

The right to associate may not be denied merely on the basis of corporate status. *NAACP* v. *Button,* 371 U.S. 415, 428 (1963). A corporation is simply one form of associational activity and inherently is no

different from other group organizations, except that it is legally accorded a separate existence independent from its members. As this Court stated in *Hale* v. *Henkel,* 201 U.S. 43, 76 (1906):

> "A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body."

That a corporation's primary function may be to pursue economic goals should not alter the protections accorded it. This Court recognizes that it would be destructive of the rights of association to prohibit advocacy of corporate viewpoints respecting resolution of business and economic interests. *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 510-11 (1972).

One effect of the Massachusetts statute restricting the right of business corporations to expend money to express their views on matters submitted to the public is to deny constitutional rights otherwise accorded to corporate stockholders and their representatives solely because of the particular form of association chosen. There is no question that, without meeting the strict tests traditionally applied to limitations on political debate, the Commonwealth of Massachusetts could not prohibit individual persons from expending money to address the wisdom of referenda submitted to the public. *Buckley* v. *Valeo, supra.* Here, however, the Commonwealth is forbidding those same rights to persons who elect to associate together in corporate form. Where the fact of association results in the loss of rights to speak, otherwise protected by law, there is

clearly a "significant interference" with fundamental rights which may be sustained only if the state meets its heavy burden of justification. *Healy* v. *James*, *supra*, at 189. For the reasons set forth by Appellants at pp. 48-56 of their brief, no such justification exists and the statute cannot be sustained.

III. Affirmance of the Massachusetts Statute Here Challenged May Ultimately Result in a Broad Restriction of the Freedom of Speech and Associational Rights of Individuals Who Associate To Advocate Their Views Collectively.

If government can silence certain speakers on certain issues, in the manner of the Massachusetts legislature, then clearly it can silence other speakers on other issues—as dictated from time to time by caprice or mistaken notions of what serves the public good. Although only business corporations are expressly covered by the Massachusetts statute, the principles articulated in the state court's opinion extend further. It is not business entities alone that elect to operate in corporate form. A wide variety of groups which pursue economic, social, religious, political or ideological goals are corporations. NLF and MALF are themselves incorporated. If this Court sustains the claim that the mere fact of corporate organization limits First Amendment protections, then not-for-profit groups (such as Amici) will be subject to legislative determinations of what matters may legitimately concern them.

If the instant restraints on corporations are permitted, which other organizations will be the likely next targets for this type of legislative restriction? What about partnerships, for example? And could the unincorporated associations—labor unions and others—long remain free to speak on similar public issues?

If the court below is affirmed, state legislatures would be afforded latitude to stifle discussion by any and all groups which oppose their actions. The value and effectiveness of association for the advocacy of political, economic or social values would be substantially crippled—a development which would operate as a significant deterrent to all association, whether in corporate or other forms.

No state should be permitted to interfere with protected associational rights or to determine which groups are appropriate advocates on any particular political, economic or social issue. If it were otherwise, a state legislature could restrict the free flow of information whenever it determines that certain viewpoints are inimical to its perception of the public good. Even if well-intentioned, such restrictions are wholly inconsistent with the requirements of the First Amendment and the functioning of a free and democratic society.

IV. This Case Is Not Moot.

The standard for establishing the existence of a continuing case or controversy was enunciated by this Court in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515 (1911): a case or controversy must, at a minimum, be "capable of repetition, yet evading review." Clearly, the distinct likelihood of future Massachusetts referenda, the time constraints inherent in such referenda, and the continuing denial under the Massachusetts statute of the right of business corporations to express their views on such referenda make mootness impossible in this case.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON, ET AL.,
APPELLANTS,

v.

FRANCIS X. BELLOTTI,
ATTORNEY GENERAL, ET AL.,
APPELLEES.

BRIEF OF ASSOCIATED INDUSTRIES OF MASSACHUSETTS, INC. AND OTHERS, AMICI CURIAE

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BRIEF OF ASSOCIATED INDUSTRIES OF MASSACHUSETTS, INC. AND OTHERS, AMICI CURIAE

Interest of Amici

This brief, submitted with the consent of the parties, is filed because the amici have a vital interest in the outcome of this litigation. The amici are Associated Industries of Massachusetts, Inc., the Greater Boston Chamber of Commerce and the Massachusetts Taxpayers Foundation, Inc., all of which are associations comprised of corporations,

other businesses and individuals interested in the economic development of the Commonwealth.[1]

Statement of the Case

Stripped of unessentials, the crucial facts are readily summarized. So far as material here, G.L. c. 55, §8 forbids business corporations from expending any monies to communicate their views on *state ballot questions* unless those questions materially affect their "property, business or assets". Section 8 goes on to provide specifically that "[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions" of *individuals* "shall be deemed materially to affect . . . [a] corporation." The validity of this limiting proviso is at issue here.

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[1] More specifically, the amici are as follows:

(a) Associated Industries of Massachusetts, Inc., is a non-profit corporation with approximately 2,500 manufacturing member companies located throughout the Commonwealth. The Association, whose member companies employ the major portion of Massachusetts manufacturing employees, is the recognized spokesman for manufacturing industry in the Commonwealth. Its purposes include: improving the economic climate of Massachusetts in the public interest and advocating fair and equitable legislation and other public policies affecting the interest of its members and their employees.

(b) The Greater Boston Chamber of Commerce is a widely based business organization duly established under the laws of this Commonwealth as a non-profit organization with approximately 1,500 members. Its purpose is to protect and promote the commercial, industrial and public interest of Boston and the greater Boston metropolitan area.

(c) The Massachusetts Taxpayers Foundation, Inc., is a nonprofit corporation with approximately 1400 members representing business corporations, financial institutions, members of the professions and individuals who are concerned with the problems of taxation and public expenditure at both the state and local levels. The Foundation is a recognized spokesman for the Massachusetts taxpayer, files and supports legislation, and publishes research reports and papers on virtually all facets of public finance and taxation.

The November 2, 1976 Massachusetts ballot contained referendum question #2 which proposed adding an amendment to the state constitution. This would authorize the state legislature to formulate a graduated income tax.[2] The First National Bank of Boston and four other corporations[3] wished to contribute to efforts to defeat that proposal, but were barred from doing so because of the §8 proviso. They thereupon commenced an original action in the state supreme judicial court against the attorney general seeking, *inter alia,* a declaration that the proviso denied them their federal constitutional guarantees of freedom of speech and equal protection of the laws. The state court rejected the federal claims. *The First National Bank of Boston, et al.* v. *Attorney General,* Mass. Adv. Sh. 134 (1977). So far as material here, the court simply asserted without discussion (*id.* at 147-48) that corporations have a constitutional right to address the public on "general political issues" only if "they have demonstrated that the proposed amendment does *in fact* materially affect their business."[4] No such proof was present here, the parties having stipulated that a division of opinion among economists existed on the issue. (*Id.* at 138.)

A timely appeal was taken to this Court. On April 19, 1977, this Court entered an order postpoing the question of its jurisdiction to the hearing on the merits and directing the parties to brief and argue the question of mootness. —— U.S. —— (1977). That question arises because on

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[2] The current provisions of the state constitution forbid such legislation. *Mass. Const. Amend. Art. 44.* If the legislature proposes to amend the constitution, it must submit the proposed amendment to the voters. *Mass. Const. Amend. Art. 48,* Init., Pt. 4, §5.

[3] New England Merchants National Bank, The Gillette Company, Digital Equipment Corp. and Wyman-Gordon Co. For convenience, the parties will be referred to by their designations in the original proceedings, i.e., as plaintiffs and defendant.

[4] Emphasis supplied throughout this brief.

November 2, 1976 the Massachusetts voters defeated the proposed constitutional amendment.[5]

Questions Presented

1. Is the case moot because the November 2, 1976 election has passed?

2. In so far as it prevents corporations from expending funds to oppose a referendum on a graduated personal income tax is G.L. c. 55, §8, invalid as a denial of freedom of speech and equal protection of the laws?

Argument

Point I. The Case Is Not Moot.

The specific occasion giving rise to this controversy has ended. The November 1976 election has come and gone and the referendum item pertaining to the graduated personal income tax has been defeated by the Massachusetts voters. Despite this fact, this appeal is not moot.

A. *Mootness Inquiry*

As presently construed, article III requires that a "live controversy" exist at all stages of federal court litigation. E.g., *Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975). But it does not follow that mootness occurs because the specific factual controversy has ended. E.g., *Super Tire Engineering Company* v. *McCorkle*, 416 U.S. 155 (1974).[6] One important illustration of that fact is the Court's retention of jurisdiction over controversies "capable of repetition, yet evading review". *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911); *Sosna* v. *Iowa, supra*, 419 U.S. at 399-401. This well-established doctrine, borrowed from the chancery practice with respect to injunctions, is designed to deal with that class of cases which would otherwise be lost to this Court's review altogether because the specific underlying controversy would end before appellate review could be obtained.

The "capable of repetition yet evading review" doctrine is not an "exception" to article III. The *minimum* requirement of a "live controversy" is satisfied under this doctrine so long as there is a reasonable possibility that the issue is capable of repetition between the existing parties — so long, that is, as there is "a reasonable expectation that the same party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975).[7] Where this Court has been satisfied that it was impossible or highly improbable that the controversy could arise again between the specific parties the case has been held moot. E.g., *Weinstein* v. *Bradford, supra*, *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Juidice* v. *Vail*, 97 S.Ct. 1211, 1215-16 (1977). By contrast, however, jurisdiction has been sustained where there seemed a reasonable likelihood that the issue could recur. E.g., *Moore* v. *Ogilvie*, 394 U.S. 814 (1969); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); and *Roe* v. *Wade*, 410 U.S. 113, 125 (1973).

The foregoing authorities show that there is a vital difference between the nature and sufficiency of the interest required to initially commence an action and the nature and

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[5] The state supreme court rejected the federal claims in a brief two page order prior to the election; its full opinion, however, was not filed until February 1, 1977.

[6] In *McCorkle* plaintiff's employers asserted that state welfare regulations entitling striking workers to welfare assistance were inconsistent with federal labor policy. This Court held that termination of the strike before trial did not moot the case, because by its "continuing and brooding presence" (*id.* at 124) the state policy would affect the "ongoing collective [bargaining] relationship" between the parties. (*Id.* at 129). See also *Scott* v. *Kentucky Parole Board*, 429 U.S. 60 (1976) (dissenting opinion).

[7] In class actions, if the suit were moot as to the named plaintiffs, the suit could nonetheless continue if the issue were likely to recur as to the members of the class, *Sosna* v. *Iowa, supra*; *Kremens* v. *Bartley*, 431 U.S. ___ (1977), 45 U.S.L.W. 4451, 4453-54.

sufficiency of the interest required to maintain one properly brought. *If a case is properly brought,* plaintiffs are entitled to an adjudication of their controversy so long as the issue is "reasonably capable" of arising again between the parties. That is without regard to whether a freshly instituted suit would have been dismissed for want of standing or as insufficiently ripe. Thus, in *Roe* v. *Wade,* 410 U.S. 113, 125-128 (1973) this Court refused to permit an attack on an abortion statute by a married woman not pregnant when the suit was commenced but permitted the suit to be continued by a woman who was no longer pregnant when the appeal was heard.

For justiciability purposes, the position of a plaintiff whose case has become moot on appeal is not identical with that of a plaintiff in a freshly instituted action. See Note, *The Mootness Doctrine In The Supreme Court,* 88 Harv.L.Rev. 373, 376-377 (1974). First, there are different considerations with respect to the "impact of actuality". Note, *Cases Moot on Appeal: A Limit on The Judicial Power,* 103 U. of Penn.L.Rev. 772, 774 (1955). Once a proper suit has been commenced and the record framed, there can be no doubt that the Court can render a decision in the context of a concrete, appropriately narrowed factual pattern which, in turn, is illuminated by specifically focused advocacy. *Schlesinger* v. *Reservists Committee to Stop War,* 418 U.S. 208, 217-218 (1974). Where the suit lacks the initial feature of a concrete "live controversy" that certainty is substantially diminished: "the absence of any injury at the outset may signal a lack of the factual concreteness which is an aid to effective adjudication." Harvard Note, *supra,* at 376.

Second, it is one thing to dismiss for lack of ripeness in a case with some contingencies because of the long-standing policy in favor of avoidance of constitutional issues. *Kremens* v. *Bartley,* 431 U.S. —— (1977). It is quite another

matter to invoke that identical policy *with the same rigor* when a live controversy has failed to reach this Court *only* because of the normal delays inherent in the judicial system,[8] particularly where free speech interests are at stake. Parties who have properly commenced a suit are entitled to have their legal controversy resolved "if there is a reasonable likelihood of recurrence". Any other rule would prevent a whole class of plaintiffs from vindicating their constitutional rights solely because the central guardians of those rights — the courts — are too slow. Moreover, any other rule would seriously undermine a central assumption of our political-constitutional order — that this Court will be able to give unity, direction and coherence to federal law. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 347-48 (1816). And so far as possible, article III should not be read to undercut the central function of this Court in giving "unity and coherence" to federal law. L. Jaffe, *Judicial Control of Administrative Action,* 589-90 (1965). This is particularly true in constitutional cases where this Court has a special function in the maintenance of the constitutional order, a function around which, as Professor Bickel rightly observed, "[s]ettled expectations have formed." Bickel, *The Least Dangerous Branch,* 14 (1962). See also, Monaghan, *Constitutional Adjudication: The Who And When,* 83 Yale L.J. 1363, 1368-71 (1973).

B. *Mootness in the Context of This Case*

This Court has been particularly reluctant to find a lack of a reasonable likelihood of recurrence where interests are implicated which are central of the functioning of an open, democratic process: free speech, *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 546-47 (1976)[9] and elections. Election cases are not moot simply when the specific election is over.

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[8] *Kremens* v. *Bartley,* 431 U.S. __ (1977), 45 U.S.L.W. 4451, 4454.

[9] See also the Court's liberal construction of the final judgment rule of 28 U.S.C. §1257 where review of free speech claims might otherwise be lost. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 477-86 (1975).

E.g., *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969); *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n.2 (1972); *Rosario* v. *Rockefeller*, 410 U.S. 752, 756 n.5 (1973). *Storer* v. *Brown*, 415 U.S. 724 (1972) is particularly instructive here. *Storer* presented various challenges to the California election laws relating to the placement of independent federal office candidates on the California ballot. The Court addressed the mootness question in a footnote (*Id.* at 737 n.8), observing:

> "The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections."

In the only cases in which mootness claims have been sustained in the election context it has been because of factors *other than the passing of the election.*[10]

We submit that the present case is controlled by the principles of *Southern Pacific Terminal* and *Storer*:

1. G.L. c. 55, §8 imposes a fixed duty upon the plaintiffs. They are under a *continuing* duty not to make the expenditures sought here.[11] E.g., *Roe* v. *Wade*, *supra* (plain-

[10] *Golden* v. *Zwickler*, 394 U.S. 103 (1969) (congressman, target of election handbills, appointed to bench); *Brockington* v. *Rhodes*, 396 U.S. 41, 43 (1969) ("limited nature of the relief sought". Plaintiff sought mandamus to certify him as a candidate.) *Hall* v. *Beals*, 396 U.S. 45 (1969) (because of intervening change in state law plaintiff not a representative of class he sought to represent).

[11] Compare *Weinstein* v. *Bradford*, *supra* (attack on parole board procedures; prisoner released from custody). *DeFunis* v. *Odegaard*, *supra* (attack on law school admission procedures; plaintiff to graduate from law school). *Craig* v. *Boren*, *supra* (male plaintiff complaining of gender based discrimination against males under 21 became 21). In each of these cases subsequent events released the plaintiffs forever from the effects of the disabilities which they had initially challenged.

tiff under a continuing duty not to undergo proscribed abortions). Moreover, the state policy is fixed and definite; it "is not contingent upon executive discretion". *Super Tire Engineering Corp.* v. *McCorkle*, *supra*, 416 U.S. at 124.[12] And the attorney general has consistently taken the view that the statute will be enforced. Indeed, even if a subsequent attorney general were of the opinion that the §8 proviso was invalid he could not reasonably interpose his judgment given the decision of the supreme judicial court in this case upholding the statute. *Richardson* v. *Ramirez*, 418 U.S. 24, 35 (1974).

2. There is, moreover, a reasonable likelihood of the recurrence of this problem between the parties. This "likelihood" is a matter not to be brushed aside on a generalized premise that plaintiffs may never face another referendum question dealing with the graduated personal income tax, any more than this Court brushed aside the plaintiffs in the cited election cases because they might never be concerned (either as voters or candidates) with a future election or the plaintiffs in *Roe* v. *Wade* because they might never be pregnant again. Mootness inquiry requires a careful, discriminating assessment of the factual likelihood of recurrence.[13] And, as elsewhere, "[p]ast experience will be a helpful, if not always an unerring, guide. . . ." *Storer* v. *Brown*, 415 U.S. 724, 742 (1974). In this case we have a pattern of conduct which has become ingrained in the Massachusetts political order.

The state constitution requires that any proposed constitutional amendment pass *two* consecutive legislative ses-

[12] Compare *Spomer* v. *Littleton*, 414 U.S. 514 (1974) holding moot a suit challenging the individual behavior in enforcing facially valid statutes of a state's attorney absent allegations that his successor would continue the same policies.

[13] Compare, for example, *SEC* v. *Medical Committee on Human Rights*, 404 U.S. 403, 405-506 (1972) and *DeFunis* v. *Odegaard*, supra, with *Nebraska Press Association* v. *Stuart*, *supra*.

sions before appearing on the ballot. *Mass. Const. Amend. Art.* 48 Init., Pt. 4, §5. Massachusetts elections in the last decade and a half have witnesses regular (1962, 1966, 1972, 1976) legislative attempts to obtain voter approval of constitutional authority for imposition of a graduate personal income tax. As plaintiffs' brief shows, the legislature in fact continued to propose such an amendment by lopsided majorities despite strong voter rejection. Moreover, there is significant and continuing political support inside the Commonwealth for a graduated income tax.[14] Accordingly, we submit that this case is not one where it is "absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968).

3. The validity of §8's proviso seems to be one "evading review" in this Court. The heavy penalties for violation of §8 discourages challenge to the statute by way of a violation.[15] And for the plaintiffs to prevail on the theory of the state court there must be a trial on the issue whether a referendum with respect to a graduated income tax would,

[14] In the court below, the Coalition for Tax Reform, Inc. (CTR), a non-profit corporation organized and existing under the laws of Massachusetts, intervened as a defendant. CTR is a so-called "umbrella" organization of individuals and other membership organizations, set up for the primary purpose of working for passage of the graduated income tax amendment to the state constitution. Its member organizations include the League of Women Voters, the Massachusetts Teachers Association, Americans for Democratic Action, Massachusetts Fair Share, Inc., Common Cause, National Association of Social Workers, Massachusetts Council of Churches, United Peoples, Inc., and others. CTR was the principal advocate of the graduated income tax (GIT) in the 1972 referendum campaign and expects it will be the principal advocate in the 1976 campaign.

[15] Statutes of this character are particularly threatening to constitutionally protected interests. Freund, *The Supreme Court of the United States: Its Business, Purpose and Politics*, 65 (1961). In any event, first amendment considerations strongly favor prospective relief here, particularly since there are no countervailing federalism considerations. Monaghan, *First Amendment "Due Process,"* 83 Harv.L.Rev. 517, 547-49 (1970).

in fact, materially affect a corporation's business. Even if one makes no allowance for the crowded and congested state of the Massachusetts trial calendar, the trial envisaged by the state court is obviously complicated; it necessarily requires testimony with respect to generalized economic and social matters, not with respect to "adjudicative" facts. Following that trial there would presumably be "findings" by the judge, followed by subsequent proceedings in the state supreme court, and finally an appeal to this Court. While one cannot speak with certainty, it is exceedingly doubtful that the case envisaged by the state court could be developed fully in time to be presented and decided by this Court in time to affect any specific ballot referendum. Even if a full factual record is not required, as plaintiffs contend, the same seems true. Plaintiffs, if they are not to be faced with ripeness difficulties, must wait until the referendum is certified for the ballot. *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21 (1974). *O'Shea* v. *Littleton*, 414 U.S. 488, 495-98 (1974).

In any event, we submit that the "evading review" component of the *Southern Pacific Terminal* doctrine is a matter of judicial discretion, not one of article III dimension. In *Franks* v. *Bowman*, 424 U.S. 747 (1976) the Court observed that the "yet evading review" aspect of the doctrine was a "self-imposed limitation of judicial restraint, not one of constitutional dimension." (*Id.* at 756 n.8; see also *id.* at 781 (dissenting opinion). The issue in *Franks* was one "capable of repetition" but not necessarily one "evading future review".[16] Nonetheless, both the majority and dissenting opinions were in agreement that the issue was properly before the Court. On both principle and authority it seems clear that all that is

[16] *Franks* was, to be sure, a class action, but that is irrelevant. *Southern Pacific* is not a doctrine uniquely related to class actions. It can be invoked by a single plaintiff, or by a class if the issue is moot as to the named plaintiff.

constitutionally required under article III to avoid mootness is that the issue be reasonably capable of repetition between the parties. As *Franks* recognzed the evading review component of *Southern Pacific Terminal* is one of those "prudential limitations", *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975), designed to minimize unnecessary federal judicial intervention into the political order. See also *Kremens* v. *Bartley*, 431 U.S. —— (1977), 45 U.S.L.W. 4451, 4453. As such, it simply creates a presumption that later review is adequate for the full protection of constitutional rights,[17] particularly where legislative policy is still in flux. Harvard Note, *supra* 88 Harv.L.Rev. at 395. Considerations of this character have substantially diminished relevance where first amendment interests are implicated. For this Court has repeatedly shown particular concern for the *in terrorem* effect of overboard restrictions on statutes directly on free speech. Note, *First Amendment Overbreadth Doctrine*, 83 Harv.L.Rev. 844 (1970).

POINT II. G.L. c. 55, §8, VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

If §8's proviso were a restriction upon individuals, its invalidity would be too plain for argument. Nonetheless, the state court upheld the proviso because it found "unpersuasive" any contention that corporate free speech rights "are co-extensive with the rights of natural persons." (1977 Mass. Adv. Sh. at 147). But the conclusion of the proviso's validity does not follow from the court's premise. That a corporation has some constitutionality rooted freedom of speech rights is conceded by the court below. We submit that the right includes speech about public issues which, as here, reasonably appears to affect the corporation's business.

[17] 1976 Supplement, p. 14 to Hart & Wechsler, *The Federal Courts and the Federal System*, (2ed.)

A. *Corporate Freedom of Speech*

That corporations are "persons" within the meaning of the fourteenth amendment was considered too clear for argument nearly a century ago. *Santa Clara County* v. *Southern Pacific Railroad*, 118 U.S. 394, 397 (1886); see also, *Sinking-Fund Cases*, 99 U.S. 700, 718-719 (1878).[18] Freedom of speech is, of course, part of the "liberty" secured to all "persons" by the due process clause. *Paul* v. *Davis*, 424 U.S. 693, 710 n.5 (1976); Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L.J. 405, 424-25 (1977). Nonetheless, we recognize that simple syllogistic reasoning will not establish either that corporations have a right of free speech or the dimensions of that right. Corporations, "persons" though they be, lack some of the constitutional protection accorded natural persons, for example, the privilege against self incrimination. By contrast, however, they possess protection under the taking clause and some measure of freedom from unreasonable search and seizure. *G. M. Leasing Corp.* v. *United States*, 97 S.Ct. 619, 629 (1977). Whether a particular constitutional right applies to a corporation requires an assessment of the nature of the corporate entity in the context of the right's general purpose. E.*g.*, *Hale* v. *Henkel*, 201 U.S. 43, 76-77 (1906).

In analyzing the corporation's position under the first amendment, we do not write upon a *tabula rasa*. Countless decisions of this Court recognize that corporations have a right to freedom of speech and this, so far as we know, has *without exception* been on the premise that the right comes directly from the federal constitution. Nor has that

[18] For lengthy historical analysis see Graham, *An Innocent Abroad: The Constitutional Corporate "Person"*, 2 U.C.L.A. Law Rev. 155 (1955). See also the separate statement of Mr. Justice Jackson in *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 574 (1849).

right been restricted to corporations engaged in the business of dissemination of ideas.[19]

The state court suggests that the corporation's free speech "right" is a "limited one". The court's implicit concession is important: while ordinarily a corporation has only the powers conferred by its corporate charter, it has, in addition, certain rights and immunities also conferred upon it by the constitution of the United States.[20]

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[19] For example, corporate employers have long been recognized as possessing a constitutional right to freedom of speech in connection with opposition to labor union organization. *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 617-618 (1969). See also the first amendment protection accorded to labor unions even though their principal activity is not the dissemination of ideas. E.g., *United Transportation Union* v. *State of Michigan*, 401 U.S. 576 (1971). So too have bars urging that restrictions upon topless dancing violate the constitution. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975) (plaintiffs are "three corporations which operate bars within the town"). More recently, this Court has held that commercial speech is also within the ambit of the first amendment. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumers' Council*, 425 U.S. 748 (1976). No serious contention could be made that *Virginia Citizens'* constitutional protection for truthful advertising is unavailable to corporations. See, for example, the cases cited at 425 U.S. at 764-65, and *Beneficial Corp.* v. *FTC*, 542 F.2d 611 (3rd Cir. 1976). Any argument that only corporations engaged in the business of disseminating ideas possess full free speech protection is without any textual or decisional support; it is, moreover, wholly unresponsive to any conceivable conception of the first amendment, which seeks to protect the interest of both the speaker and his audience. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumers Council, Inc.*, 425 U.S. at 756-57 (1976).

[20] This, in turn, means that suggestions in some nineteenth century decisions that states had "absolute" control over the conditions under which corporations did business are unsound in rationale, although not necessarily in specific holding. Whether viewed as a "privilege" or "right" a corporate charter, like any other state grant, cannot be made subject to an unconstitutional condition. State power over corporations, foreign or domestic, "is subject to the limitations of the supreme fundamental law". *Terral* v. *Burke Construction Co.*, 257 U.S. 529, 532-33 (1922); *WHYY* v. *Glassboro*, 393 U.S. 117, 119 (1968). See generally, Note, *Unconstitutional Conditions*, 73 Harv.L.Rev. 1595 (1960). Clearly, therefore, a business corporate charter could not be conditioned upon a limitation that the corporation support the policies of the incumbent governor, or the views of the Democratic Party, or on support of a graduate income tax. Any such limitation would be an unconstitutional condition violative of the constitutional guarantee of free speech. See here also; the §8 proviso is an unconstitutional condition upon the charter of the business corporations in Massachusetts. This fact is, of course, regularly confirmed every time this Court invalidates on constitutional grounds, a state-law restriction in suits brought by corporate plaintiffs.

So far, so good, But the state court then goes on to say — without a single suporting citation of any kind or any supporting intellectual rationale — that the corporation's general speech rights are limited to those issues which, in fact, affect its business.

A corporation is not a "fiction" in the ordinary sense, as Professor Lou Fuller observed in his classic essays. Fuller, *Legal Fictions*, 19 (Stanford 1967). It is simply one institutional form by which the legal order responds to the phenomena of regularly recurring group activity. As this Court observed in *Hale* v. *Henkel, supra*, at 76:

> "a corporation is, after all, but an association of individuals under an assumed name with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body."

The state court, however, put corporations in a class different from other closely analagous groups so far as their public speech "rights" are concerned. In so doing, the state court inverts ordinary first amendment analysis which requires a comparison of the burden on speech with the countervailing governmental interests. *Linmark Associates, Inc.* v. *Willingboro*, —— U.S. —— (1977), 44 U.S.L.W. 4441, 4443; *Elrod* v. *Burns*, 427 U.S. 347 (1976). The state court, however, purports to dispense with any consideration of the sufficiency of state justifications for

interference with the speech by focusing upon an abstract definition of the "right" itself. In so doing, it gives point to Justice Holmes admonition that "[s]uch words as 'right' are a constant solicitation to fallacy". *Jackson* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1931).

We submit that the approach of the state court is not only singular but highly undesirable. *First,* the "limited right" rationale is inconsistent with the fundamental premise that the first amendment is designed to protect the listener's right, not the speaker's. E.g., *Virginia Citizens' Consumers Council, supra,* note 19; *Linmark Associates, Inc.* v. *Willingboro, supra,* see 45 U.S.L.W at 4445. Why some speakers should have limited "rights" in that context is not readily apparent, particularly when functionally the speaker is no different from other groups. See *Buckley* v. *Valeo, supra,* 424 U.S. at 19, invalidating spending restrictions on individuals *and groups.* See also, *Abood* v. *Detroit Board of Education,* 431 U.S. —, — at n.32 and related text (1977) (spending by union for political purposes assumed to be constitutionally-protected activity).

Second, the line between the general political issues which, in fact, "affect" a business and those which do not is not likely to prove a stable one. *Hynes* v. *Oradell,* 425 U.S. 610, 620 (1976). The reality of this fact is already apparent in Massachusetts. As plaintiffs point out in their brief, just recently the attorney general challenged corporation expenditures in Worcester, Massachusetts, which urged favorable action on a referendum on whether a new civic center should be built. The corporation responded that a new civic center would materially improve the overall climate of the city, and thus ultimately have a substantial economic impact by increasing the corporation's ability to attract and retain personnel. Can the corporation "prove" that fact in any conventional sense? In this case the state court found that plaintiffs had failed to

"prove" that a graduated personal income tax would, in fact, "affect" the business of the plaintiff corporations.[21] Their admittedly reasonable belief was not enough.

This rigorous proof requirement imposes a heavy burden and is, so far as we are aware, without analogue in any decision of this Court. The state requires proof not with respect to adjudicative facts,[22] but with respect to legislative facts. A judge would be asked after an evidentiary hearing to conclude as a "fact" whether certain legislation or other public events would, in fact, adversely affect a corporation's business so as to justify corporate opposition thereto. There is, of course, no reason why different judges could not reach different "factual" conclusions with respect to the same set of facts. We know of no case involving freedom of speech in which there has been analogous judicial inquiry into such open-ended factual determination as a precondition to the exercise of free speech rights.[23] *"Facts of the character required by the state court cannot be "proved" or "disproved" in any conventional sense.* For example, suppose that corporations decided to oppose a particular candidate for public office because of his well-known anti-business views. Clearly the corporations could not "prove" that the candidate's election would, *in fact,* adversely affect their business operations, given the wide

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[21] That conclusion is not without its wry aspects. It was, after all, reached despite the contrary views of the five corporate business plaintiffs who are willing to expend funds in litgation to free themselves from the statutory restriction. Moreover, plaintiffs are fully supported here by the business oriented *amici.*

[22] Those who are typically involved in first amendment cases. E.g., *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974).

[23] *Dennis* v. *United States,* 341 U.S. 494 (1951) is arguably an exception to this statement, although the Court excluded from review any question whether the speech of the Communist Party posed, in fact, a clear and present danger of any substantive evil. See, in particular, the concurring opinions of Jackson and Frankfurter, J.J., on the lack of judicial capacity to make such open-ended factual inquiries.

variety of factors and people which determine the content of any specific piece of legislation. Indeed, manufacturing establishments could not oppose a general tightening of the anti-trust laws because they cannot "prove" that more rigorous enforcement of the anti-trust laws would, in fact, affect their business in any adverse sense. Compare *Eastern Ry. Conf.* v. *Noerr Motors, Inc.*, 365 U.S. 127, 137-39 (1960).

If the state court's proof requirement is taken seriously, the net effect of its holding would be restrict non-media corporations to speech akin to their specific commercial advertising, e.g., *Beneficial Corp.* v. *F.T.C.*, 542 F.2d 611 (3d Cir. 1976), cert. den. —— U.S. —— (1977), or specific labor-management problems. *N.L.R.B.* v. *Gissel Packing* Co., 395 U.S. 575 (1969). This fact appears even more clearly from another consideration. The difficult proof question will generate considerable pressure for a court to yield to "rational" legislative fact finding.[24] That, of course, occurred in this very case. (Mass. Adv. Sh. at 150.) But beyond the crushing impact this will have on corporate free speech rights the state court's deference creates another difficulty. The Massachusetts legislature purports to permit a corporation to speak on any general policy issues which, in fact, affect their business or assets. But with respect to a single issue, the graduated personal income tax, the legislature denies a corporation the right to prove that ultimate fact. In so doing, the legislature has created an unconstitutional irrebutable presumption. We are not here pressing any wide ranging theory of irrebuttable presumptions. Any such approach is wholly foreclosed

[24] Even deference to congressional fact finding under *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) would not extend to curtailments of constitutionally protected rights. *Id.* at 651 n.10. See also Cohen, *Congressional Power To Interpret Due Process and Equal Protection*, 27 Stan.L.Rev. 603 (1975).

by *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); see also *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1977). But, as *Salfi* itself recognizes, the doctrine retains vitality where fundamental rights are at stake. (422 U.S. at 770-72.) See also *Turner* v. *Department of Employment Security*, 423 U.S. 44, 46 (1975). Here the Massachusetts legislature has made relevant the question whether public speech affects the corporation's business or assets, but with respect to one such issue it purports to foreclose proof on the matter. That seems to us to fall within the core of the remaining doctrine prohibiting irrebutable presumptions.

B. *The Asserted Justifications*

If the case is analyzed in conventional terms, the only remaining question is whether the burden on speech established by the state statute is outweighed by any state justification. E.g., *Linmark Associates, Inc.* v. *Willingboro, supra; Elrod* v. *Burns*, 427 U.S. 347, 371-72 (1976) (plurality opinion). The state court did not articulate any. And, as we shall show, the only *legitimate* state justification is one related to *ultra vires*. But that justification cannot explain the patently underinclusive character of the Massachusetts statute. More fundamentally, any legitimate state concern along these lines, when measured against the constitutional rights at stake, is satisfied so long as the corporation's determination of "affect" is not wholly unreasonable.

1. *Corrupting the Electorate.*

Intervenors in the court below vigorously argued — and we agree — that the §8 proviso's "real" purpose is a legislative fear that corporate wealth would "drown" out the voice of its opponents on the specific issue of a gradu-

ated personal income tax, when that issue reached the electorate. But the "corrupting the electorate with too much information" rationale was not relied upon by the state court. For good reason. It is impossible to square a corruption rationale with the fundamental political and constitutional foundations of our republic institutions. It is, moreover, plainly foreclosed by this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1, 18-19, where the Court observed, *inter alia*, that

> "A restriction on the amounts of money a person or *group* can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[25]

See also *Schwartz* v. *Romnes*, 495 F.2d 844, 851 (2d Cir. 1974). See also *Pacific Gas & Electric Co.* v. *Berkeley*, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976); *C. C. Plywood Corp.* v. *Hanson*, 420 F. Supp. 1254 (D. Mont. 1976), appeal pending, 9th Cir. No. 76-3118. Indeed, the *Buckley* condemnation applies *a fortiori* here. The §8 proviso is not an effort to restrict the *amount* of expenditures, as was the statute invalidated in *Buckley*, but the *content* of the speech no matter how little is in fact spent by the corporation.

[25] *Buckley* referred to restrictions on "individuals *or* groups". Given the interest of the audience in the information communicated, *Virginia Citizens Consumer Council*, by what alchemy does a constitutionally impermissle interest suddenly become transformed into a constitutionally permissible one simply because the identity of the speaker changes from "individuals or groups" to a corporation—a specialized form of group association. There is simply "no justification for treating [plaintiffs] differently in these circumstances simply because [they are] corporations." *G. M. Leasing Corp.* v. *United States*, *supra* at 645.

Moreover, the corporate wealth justification cannot explain §8's patently underinclusive character. Other substantial aggregate of business wealth, such as real estate investment trusts (REIT's), partnerships,[26] and labor unions are permitted to speak on this issue. Efforts were made to distinguish some of these situations,[27] but the attorney general conceded that REIT's (which have transferable shares) cannot be distinguished from corporations. There are 7,500 such business units in Massachusetts and they possess enormous wealth. (The twenty largest REIT's have assets in excess of $5 billion).

2. *The ultra vires rationale.*

The most obvious defense for a requirement of proof required by the state court is that if corporate speech in connection with the graduated income tax does not "affect" the corporation, it would be "ultra vires". Thus, the §8 proviso simply prohibits corporate management from straying from the purpose of the corporate charter. But the §8 proviso cannot rationally be defended upon such a supposed *ultra vires* basis. Two of the plaintiffs are federally chartered banks and it is not obvious what the authority of state law is to structure the ambit of their authority. More generally, the distinction between corporations and other business units makes no sense in light of such a purpose. Nor does §8 even maintain a consistent policy with respect to business corporations. Nothing prohibits Massa-

[26] It is stipulated that there are some 15,000 partnerships in the Commonwealth.

[27] The attorney general argued that partnerships can be distinguished because they exist independently of statutory permission. But they are subject to extensive regulation, see G.L. chapters 108 and 109 on partnership and limited partnerships. And unless *Lochner* v. *N. Y.*, 198 U.S. 45 (1905), is revived, partnerships could be prohibited entirely, or their existence made conditional upon receipt of a state license or charter.

chusetts business corporations from now engaging in speech against the graduated income tax or from doing so while that issue is pending before the Massachusetts legislature, or even, as the state court recognized (1977 Mass. Adv. Sh. at 152), when corporations are communicating to their stockholders about the referendum. That speech is forbidden *only* when the question leaves the legislative forum and is submitted to the people by way of a referendum. Why the instant at which the forum for discussion shifts to the people at large demonstrates that a corporation's opposition to a graduated income tax no longer legally "affects" it is, frankly, a mystery far too deep for us to penetrate.[28] The present statutory scheme is so irrational that it would deny business corporations equal protection of the laws even if no free speech interests were implicated. And, plainly, the discriminations worked by the §8 proviso are so unreasonably underinclusive that the proviso does not satisfy the exacting scrutiny required when constitutionally protected interests are at stake. *Police Department* v. *Mosley*, 408 U.S. 92, 96-99 (1972).

But there is another and more fundamental objection to any "ultra vires" objection impermissible content discrimination. Out of a wide range of issues which a corporation might feel impelled to speak about, only one — the graduated state personal income tax — is excised and then only if it is before the people by way of a referendum. To repeat, whatever may be the permissible range of content discrimination, see *Young* v. *American Mini Theatres*, 427 U.S. 50 (1976), we are aware of no decision which would remotely support the restrictions here involved. Any presumed legislative goal of ensuring that a corporation not act *ultra vires*, is hardly of the "compelling" *Buckley* v. *Valeo*, 424 U.S. 1, 25, 66-68 (1976) or "overriding" (*Elrod* v. *Burns*,

[28] The explanation, we think, lies in the dynamics of Massachusetts politics. The legislature has generally favored a state constitutional amendment permitting a graduated personal income tax, but these proposals have repeatedly lost on the ballot.

427 U.S. 347, 368 (1976) (plurality opinion) nature necessary to support a material interference with free speech rights, particularly one aimed directly at the content of speech. Any legitimate state interest is satisfied by a requirement that the corporate judgment that its expression of views or a public issue is permissible so long as it reasonably appears to affect its business.

3. *The interest of dissenting stockholders.*

In the court below the attorney general suggested that a permissible purpose for the §8 was to prevent the use of stockholders' money to oppose a referendum issue which some stockholders as individuals might favor. This is, of course, an argument closely akin to an *ultra vires* argument. It is without substance. Surely, no shareholder is meaningfully "coerced" into making a "speech" if the §8 proviso is invalidated — any more than he would be impermissibly coerced if he disagreed with corporate speech which *admittedly* affected the corporation's business. Nor is the shareholder's investment "wasted", any more than it is wasted if the corporation engages in any other conduct which he thinks is unwise or with which he disagrees. Moreover, this is not a case where, as in a unified bar or an agency shop, a member is, in a real sense, involuntarily a part of an organization. *Abood* v. *Detroit Board of Education*, 431 U.S. — (1977). A shareholder's only link is financial; presumably he can sell and invest his money elsewhere.[29]

What is more, the suggested explanation will not explain the irrational character of the present Massachusetts scheme. It will not explain, for example, why other business units — such as Massachusetts real estate investment trust or partners — are not under a similar limitation.

[29] Moreover, as *Abood* makes plain, the interest of dissenting shareholders could be protected in ways other than a total ban on speaking by the corporation.

Conclusion

The judgment should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON, NEW ENGLAND MERCHANTS NATIONAL BANK, THE GILLETTE COMPANY, DIGITAL EQUIPMENT CORPORATION, AND WYMAN-GORDON COMPANY,

Appellants,

vs.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL, AND COALITION FOR TAX REFORM, INC., AND UNITED PEOPLES, INC.,

Appellees.

BRIEF OF THE STATE OF MONTANA, AMICUS CURIAE

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SUMMARY OF ARGUMENT

The issue as framed by Appellants is that corporations are entitled to complete freedom of speech under the First Amendment. But, is that really the question that should be addressed by the Court?

Appellants are business corporations who wished to use corporate funds, in violation of State law, for the purpose of defeating a ballot referendum proposing a State graduated income tax.

All activities of these business corporations are necessarily directed to advancing business interests. Therefore, to the extent that speech is involved at all here, it is not ordinary political speech, but rather a species of commercial speech. While this Court has recently recognized that commercial speech is entitled to some constitutional protection it has also recognized that this form of speech is not entitled to unrestricted constitutional guardianship. The rationale for the long history of State safeguards on the integrity of the election process, especially regarding corporate influence, more than justifies the restrictions upon commercial speech.

Amicus further contends that a corporation is an artificial entity, incapable of forming an opinion. If the Massachusetts statute does impose an infringement upon speech, it is a time, place and manner restriction upon the speech of management.

The problem of corporate spending in initiative and referendum campaigns is of keen interest to the State of Montana and its citizens. The issue was recently the subject of litigation in Montana.[1] An appeal is currently pending that will undoubtedly be influenced by the decision of this Court.

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1 *C & C Plywood Corporation* v. *Hanson*, 420 F. Supp. 1254 (D. Mont. 1976).

ARGUMENT

I.

The Speech of the Profit Imperative

Appellants herein are business corporations. As such they are established for one reason, the acquisition of profit.

Profit orientation is not wrong; it is in fact basic to the system of economics in the United States. Corporations are required to pursue profit.[2] The old doctrines of waste and ultra vires are the direct result of the law's insistence upon a profit imperative. The corporation is in business to make money, as it should be. For this reason its speech, regardless of form, must be presumed to be commercial.

It may not be possible to construct a definition of commercial speech that encompasses all the facets of economic dialogue. Such a test cannot be narrowly construed. For instance, compare the two messages "I will sell you X cigarettes for fifty cents" and "Winston tastes good like a cigarette should." Certainly the second is no less commercial than the first. Thus a message cannot be classified as commercial only when it proposes a commercial transaction.

Nor can it be so classified simply on the basis of its content. To illustrate this fact, compare an identical

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2 "It is undoubtedly the orthodox view that the function of the business corporation is profit and that it is therefore improper for it to spend money or engage in activities not entered into with a view toward profit." W. CARY, CASES AND MATERIALS ON CORPORATIONS (4th Ed. 1969), 60.

message spoken by two different speakers. If a druggist says "X drug is for sale at Y price," his message is obviously commercial. If the Virginia Citizens' Consumer Council says the same thing, it is not; it is a message of some interest to consumers, but grounded upon a more altruistic motive. Therefore, it is equally necessary to identify commercial speech by the motive or interest of the speaker.

The business corporation is the manifestation of the profit imperative. It must direct all endeavors toward its fundamental goal. When it follows this business motive corporate speech is commercial no matter what the superficial form of the message. Management is under a fiduciary obligation to use corporate capital to produce a return, and of necessity uses corporate speech strictly to that end. Thus plaintiffs in this case oppose the income tax referendum solely because of its effect on business, and that of course is precisely what they argue. This is commercial speech.

The distinction between commercial and individual speech is discussed by C. E. Baker, Commercial Speech: A problem in the Theory of Freedom, 62 Iowa L. R. 1, 3, 13 (1976):

> [T]he individual uses speech to order and create the world in a desired way and as a tool for understanding and communicating about that world in ways which he or she finds important. In fact, the values supported or functions performed by protected speech result from that speech being a manifestation of individual freedom and choice. However, in our present historical setting, commercial speech is not a manifestation of individual freedom and choice; unlike the broad categories of protected speech, commercial

> speech does not represent an attempt to create or affect the world in a way which can be expected to represent anyone's private or personal wishes.
>
> [T]herefore, a profit-motivated or commercial speech lacks the crucial connections with individual liberty and self-realization which exist for speech generally, and which are central to justifications for the constitutional protection of speech, justifications which in turn define the proper scope of protection under the First Amendment.

In *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council,* 425 U. S. 748 (1976), this Court for the first time, granted a degree of First Amendment protection to speech of a purely commercial nature. The Court did not hold, however, that all forms of commercial speech were beyond the parameters of state control.

To distinguish this case, it is important to realize the interest the Court sought to protect in *Virginia Board of Pharmacy* (supra), and most recently in *Bates v. Arizona Bar,* 45 U. S. L. W. 4895 (1977). The public interest may be served by commercial speech in some forms. Often it is of positive social benefit as the Court in the *Bates* opinion stated at 4899:

> The consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of importance to significant issues of the day. See *Bigelow v. Virginia,* supra. And commercial speech serves to inform the public of the availability, nature and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system [cita-

> tions omitted]. In short, such speech serves individual and societal interests in assuring informed and reliable decision making.

At the same time, the cases hold that commercial speech is of a different constitutional character than other varieties, and will admit of regulation that could never be applied to the arts, letters, political, religious or scientific debate, or to a newspaper. *Virginia Board, supra* at 771 held:

> 24. In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are common sense differences between speech that does "no more than propose a commercial transaction" [citations omitted] and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and subject to complete suppression by the state, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of commercial information is unimpaired. . . . Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely. Attributes such as the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker . . . they may make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings and disclaimers, as are necessary to prevent its being deceptive. . . . They may also make inapplicable the prohibition against prior restraints. . . . "

The rationale of *Virginia Board* and *Bates* seems to us significant. The societal interest served is the protection of consumers. The demonstrable economic benefits of the free flow of commercial information were more valuable

to society than whatever interest was promoted by the restriction. However, in the case at bar it is the restriction of commercial speech that serves the overriding interest of society.

II.

The State's Responsibility to Safeguard Elections is Sufficient Ground for Restricting Corporate Spending on Ballot Issues

If corporate spending on ballot issues is "speech," then it is commercial speech. The next question is whether States have constitutionally adequate justification for prohibiting this form of speech. The justification is rooted in the political relationship between corporations and the State. States have clothed corporations in such attributes as limited liability and perpetual life in order to increase the economic viability of corporations and so strengthen the economy generally. But the entity thus created and strengthened by the State has sometimes become so powerful that it has threatened the State itself. Vast economic power is readily translated into political power, and States have had to guard continually against excessive corporate influence in the political sphere. Speaking of this watchfulness on the part of States, Justice Brandeis called the corporation "an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State." *Louis K. Liggett Co. v. Lee,* 288 U. S. 517, 565 (1933) (Brandeis, J., dissenting). *Amicus* suggests that the State's necessary resistance to that domination provides adequate ground for prohibiting corporate spending on ballot issues.

Throughout this century, the State's fear of corporate domination has been reflected most clearly in election laws. Congress and many State legislatures passed laws prohibiting corporations from contributing to election campaigns.[3] The Supreme Court has recognized that the Federal prohibition was motivated primarily by "the necessity for destroying the influence over elections which corporations exercised through financial contribution." *United States v. Congress of Industrial Organizations*, 335 U. S. 106, 113 (1948). A later opinion recognizes that the States responded to the same motivation. Justice Frankfurter quoted approvingly from Elihu Root's 1894 speech in favor of a New York ban on corporate contributions:

> The idea is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to those halls in order to vote for their protection and the advancement of their interests as against those of the public.

United States v. U.A.W.-C.I.O., 352 U. S. 567, 571 (1957).

Bans on corporate contributions in support of the election of candidates have been upheld. *Buckley v. Valeo*, 424 U. S. 1 (1976). If corporate speech (commercial speech) may be restrained to guard the electoral process when public officials are being elected, how can such restraint be unconstitutional when ballot issues are involved? The ultimate goal of the State in both cases is precisely the same: to guarantee that the economic power of corporations does not unduly influence the making of laws.

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3 18 U. S. C. 610; Section 23-4744, Revised Codes of Montana, 1947.

It was precisely to counter this influence that State constitutional provisions for initiative and referendum were established.[4] They represent attempts by the citizenry to allow the passage of legislation free of the corruption of earlier times. But even where initiative and referendum are available, corporations can exert a degree of influence which States might well consider a threat to the integrity of the political process. In 1976, the California law limiting expenditures in ballot issue campaigns was invalidated on the strength of *Buckley*. *Citizens for Jobs & Energy v. Fair Political Practices Commission*, 16 Cal. 3d 671, 129 Cal. Rptr. 106 (1976). In the subsequent campaign against the passage of a referendum measure which would have required legislative approval of nuclear generating plant sites, a political committee known as "Citizens for Jobs and Energy" collected $2,630,104 of the total $2,771,804 collected by all opponents of the measure.[5] Two-hundred and three corporate contributors gave a total of $2,527,558, or 96% of all the money that CJ&E received. Supporters of the measure collected $1,903,425, or 68% of the total collected by the opponents. No corporations are listed among the contributors in support of the measure, which was defeated in the primary election.

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4 The constitutions of 21 states provide for peoples initiative, and 38 plus Puerto Rico and the Virgin Islands have the referendum. Council of State Government, Book of the States, 48-50 (1974 ed.).

5 These and subsequent figures on the California campaign are from Campaign Contribution and Spending Report—June 8, 1976 Primary Election, published by the California Fair Political Practices Commission, October 29, 1976.

Later in the same year, a similar initiative measure was qualified for the general election ballot in Montana. Since Montana's statute prohibiting corporations from contributing to ballot measures had been declared unconstitutional,[6] corporations were allowed to spend money on the measure. The "Montanans Against '71' Committee-Citizens Opposed to the Nuclear Ban" collected $144,300 in contributions, of which $315 came from individuals, and the remaining 99.8% from business corporations.[7] Proponents of the measure collected and spent $451, all donated by individuals. The measure was defeated.

It may never be possible to prove that corporate contributions were decisive to the outcome of a particular ballot issue. Yet a State legislature, faced with figures like those just cited, would be well within the bounds of reason if it feared that corporate economic power was overwhelming rational citizen decision-making in the referendum or initiative process. The question, finally, is whether, to prevent that possibility, the State can prohibit one type of commercial speech: corporate contributions on ballot issues. The State interest involved is no less than the integrity of the political process.

Many State legislatures are constitutionally required to "insure the purity of elections and guard against abuses

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6 *C & C Plywood Corporation v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976).

7 These and subsequent figures on the Montana campaign are from sworn statements of contributors and committees in the files of the Montana Commissioner of Campaign Finances and Practices.

of the electoral process."[8] Such a mandate is a key feature of a State constitution, since any abuse of the electoral process threatens self-government, and so threatens the constitution itself. If States may not regulate commercial speech in the name of this ultimate State interest, then it is difficult to imagine when commercial speech could be regulated at all. Yet the Supreme Court has said that commercial speech may be restrained for the purpose of precluding misleading statements about legal services. *Bates v. Arizona Bar, supra.* If that purpose is compared to the purpose of protecting the integrity of the political process, there can be no doubt about which is the more crucial State interest. The conclusion must be that States have constitutionally adequate justification for prohibiting corporate contributions on ballot issues.[9]

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8 Montana Constitution, Article IV, § 4; Cf.: California Constitution, Article II, § 3.

9 *Buckley* found that the gift of money to another for political use was more "conduct" than "speech," and statutory limitations on it were upheld.

Montana's experience has been that corporate contributions to ballot campaigns are overwhelmingly of the indirect variety. Corporations wishing to influence ballot issues give their money to committees like the "Montanans Against '71' Committee—Citizens Opposed to the Nuclear Ban," rather than spending it in their own names. In California, 95% of the money contributed in opposition to the nuclear proposal was channeled through the committee called "Citizens for Jobs and Energy." Thus experience shows rather dramatically that corporate contributions to ballot campaigns is more legitimately covered by the "gift" portion of *Buckley* than by the "expenditure" portion, and therefore more appropriately called "conduct" rather than "speech."

(Continued on next page)

III.

A Corporation is Not An Individual

> "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen. . . . " Mr. Chief Justice Marshall In *Bank of the United States v. DeVeaux, et al.*, 2 U.S. (5 Cranch) 194, 196 (1809).

It is common for the law to single out a particular person or entity and prescribe special prohibitions or qualifications upon its speech. These are not true "content" restrictions, for anyone else other than the speaker is free to say the same thing. In certain situations the ful protection of the First Amendment does not apply to

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(continued from previous page)

There is another aspect of this corporate spending through committees which is particularly relevant to ballot issues. Referendum and initiative are legislative processes performed directly by citizens as flesh-and-blood people. The Montana Constitution provides in Article V, § 1 that "The people reserve to themselves the powers of initiative and referendum." When corporations form political committees to support or oppose ballot issues, they almost invariably assume a name which makes them appear to be among the "citizens" or "people" to whom these processes are reserved. Newspaper readers and television viewers never know that 96% of the aid paid for by "Citizens for Jobs and Energy" was really bought by corporations who are not "citizens" at all, or that 99.8% of an ad in the name of "Montanans Against '71' Committee—Citizens Opposed to the Nuclear Ban" was bought by corporations who are not "citizens," or that 97% of the same ad was bought by out-of-state money. It is precisely such subterfuges that States seek to avoid by banning corporate contributions on ballot issues. The legislative intent is to fulfill the spirit of the constitutional provision reserving initiative and referendum to the people.

that speaker. Examples are the restraints placed upon the political activity and speech of civil services employees;[10] upon members of the military services;[11] upon the voting rights of felons;[12] and, prominently, the FCC's "Fairness doctrine" imposed upon broadcasters,[13] who, unlike the first National Bank, are actually in the First Amendment "business." The Massachusetts statutory scheme places such a speaker restriction on business corporations.

Corporations are treated singularly because the corporate form exists only in contemplation of law. It is an artificial entity, a fictitious "person." People create corporations because it is a convenient way of doing business and the State grants it its right to existence. Incorporation is a way of divorcing a business entity from its human ownership and management. In fact, the most important function of the corporation is to legally formalize this separation.

The focus of the Bill of Rights is upon the freedom and liberty of the individual. See: *Bell v. Maryland*, 378 U. S. 226 (1964). For the most part it guarantees freedoms which can only be exercised by natural human beings. As a legal fiction, a corporation enjoys its benefits only insofar as it needs or is capable of exercising them. The facts of this case establish no such need, and the

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10 *Civil Service Commission v. National Association of Letter Carriers*, 413 U. S. 548 (1967).

11 *Secretary of the Navy v. Avrech*, 418 U. S. 676 (1974).

12 *Richardson v. Ramirez*, 418 U. S. 24 (1974).

13 *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367 (1968).

corporation simply lacks the capability. The plain fact is that any opinion on the tax referendum must be traced to the desires and decisions of natural persons. Plaintiffs must therefore define whose speech the law has abridged. Either it restricts the speech of the stockholders or that of management.

The First National Bank is not the NAACP. The cases granting institutional First Amendment rights to such organizations have been careful to point out their cohesive quality and the presumptively common purpose of their memberships, e. g.,: *NAACP v. Button,* 371 U. S. 415, 443 (1961).

The Bank's stockholders, on the other hand, are "unidentified members of the public at large," and can scarcely be said to have bought their stock as an act of political symbolism. Nor can they realistically be expected to thing cohesively on political issues. The law, in fact, seems designed to protect that segment of ownership which might have no opinion or even disagree with management[14] when the corporation's funds are put to a political purpose. Moreover, the shareholders' speech can hardly be said to be abridged since they are free to use their personal funds to support or oppose any political issue.

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14 Compare the Court's concerns for protection of minority membership expressed in *Abood v. Detroit Board of Education,* 97 S. Ct. 1982 (1977); *Brotherhood of Railway Clerks v. Allen,* 373 U. S. 113 (1963); *Association of Machinists v. Street,* 367 U. S. 740 (1961); and notably, *Pipefitters Local 562 v. United States,* 407 U. S. 385 (1972).

If there is "speech" involved here, it must be the speech of management. But corporate managers are free to speak as they wish, and to spend money to promote their beliefs and ideas. What they claim is that their speech is abridged by their inability to use their employer's treasury to promote political viewpoints.

It will inevitably be claimed by Plaintiffs that opposition to the Massachusetts tax referendum is in the best interest of their corporations, and a matter of sound business judgment. Perhaps so. But even within its proper business context, the speech of the commercial enterprise is subject to regulation in the public interest. The speech restrictions of the National Labor Relations Act,[15] the Securities Acts of 1933 and 1934,[16] and the Truth-in-Lending Act.[17] are prominent examples, and elections are another.[18]

Whose speech, then, is abridged by Mass. G. L. Ch. 55, § 8? It seems to us that rather than a content restriction on the speech of corporations, the statute is a time, place, and manner restriction upon management.

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15 29 U. S. C. 141, 151, 158.

16 15 U. S. C. 77, 78.

17 15 U. S. C. 1601, et seq.

18 2 U. S. C. § 441(b).

CONCLUSION

The activities of business corporations are wholly submerged by the dictates of business interests. Any "speech" capabilities they have must therefore be commercial. While commercial speech enjoys some First Amendment privileges it must bow to State prohibitions promulgated to serve overriding societal interests, such as the integrity of the electoral process.

A corporation is not an individual. To say that it has an opinion is specious. It might as well claim freedom of religion. It seems to us the very paradigm of irony, that an Amendment enacted in the days of Reconstruction as a shield for the poor and defenseless, should now be used as a sword by the wealth and power demonstrated by the array of Plaintiffs in this cause.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1172

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v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL, and COALITION FOR TAX REFORM, INC., and UNITED PEOPLES, INC., *Appellees.*

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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---

MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

Pursuant to this Court's Rule 42, Pacific Legal Foundation hereby respectfully moves the Court for leave to file its brief *amicus curiae* bound with this Motion.

Pacific Legal Foundation has the consent of counsel for appellants, but has been unable to receive consent

from counsel for appellees. Letters from appellants and appellees have been filed with the Clerk.

The accompanying brief urges this Court to reverse the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts in *The First National Bank of Boston, et al* v. *Bellotti, et al.*, 359 N.E.2d 1262 (1977), which held the provisions of Massachusetts General Laws (G.L.) c.55 § 8 Constitutional.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for the Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The Pacific Legal Foundation, due to its unique public interest perspective, believes that it can provide this Court with a more complete argument of the public interests at stake in this litigation.

Pacific Legal Foundation believes that the Supreme Court of Massachusetts erred in upholding the constitutionality of G.L. c.55 § 8 because the statute is constitutionally invalid as a denial of freedom of speech protected by the First Amendment. If the decision is allowed to stand, the statute will have a chilling effect on the exercise of freedom of speech by appellants and parties similarly situated and a direct detrimental effect on the functioning of business corporations.

Many of PLF's supporters and contributors are directly affected by the subject matter of this litigation and are concerned about the implications that such an infringement on free speech by a state legislature will have an the quality of public debate necessary to the electoral process. Secondly, as consumers they have a substantial interest in the ultimate impact such legislation will have on the economic well-being of American business corporations.

PLF strongly urges that the issues this case raises be considered on the merits. The case is not moot. It is typical of those cases which this Court has characterized as "capable of repetition, yet evading review". *Southern Pacific Terminal* v. *ICC,* 219 U.S. § 498 (1911). Furthermore, we believe that the issues in this case involve an infringement on fundamental rights protected by the Constitution and that there is a great public interest in the clarification of the constitutional questions presented.

For the foregoing reasons, Pacific Legal Foundation respectfully requests permission to participate as an *amicus curiae* and to file the attached brief supporting appellants.

Respectfully submitted,

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On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

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BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The interest of the *amicus curiae* is set out in the preceding Motion to file this brief.

OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 359 N.E.2d 1262 (1977).

INTRODUCTION

The Amicus adopts the Statement of the Case as set forth in Appellants' Jurisdictional Statement.

In order to place the argument of *amicus* against a finding of mootness in proper perspective, a brief description of those interests which Pacific Legal Foundation has identified as involved in this case follows.

The Massachusetts statute here challenged will have a continued chilling effect on the political expression of appellants and has not been mooted by the passing of the November 2, 1976 election. That election marked the fourth time that the Graduated Income Tax (GIT) referendum in issue had been placed before the voters of Massachusetts and there is no guarantee that it will not reappear in subsequent elections. Fundamental rights of freedom of political expression will continue to be impaired by the decision of the Supreme Judicial Court of Massachusetts upholding the constitutionality of this statute.

Pacific Legal Foundation recognizes that the effect of the statute is not limited to restricting the rights of appellants but moreover, will be felt by the general public. By restricting the political expression of business corporations, which constitute an important sector of the community, the people of Massachusetts will be deprived of a full debate on issues of public interest and and their constitutionally recognized right to receive information will be violated.

ARGUMENT

I.

Under The Traditional Standards Of Law, This Case Is Not Moot

The doctrine of mootness is based upon the requirement of Article III § 2 of the United States Constitution, which precludes judicial review of abstract questions and contrived disputes. *Liner* v. *Jafco, Inc.*, 37 U.S. 301 (1964). The Court has defined a case or controversy as one which:

> [M]ust be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical statement of facts." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-41 (1937).

The mootness doctrine merely requires that this case or controversy requirement be met at each stage of judicial review. *U.S.* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

However, the right to present a case or controversy cannot be defeated artificially by focussing on short-term activity while ignoring the long-term, recurring nature of the abuse. *Roe* v. *Wade*, 410 U.S. 113 (1973). This Court has consistently thwarted attempts to use strategically timed mootness arguments to avoid judicial scrutiny of important issues. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Carroll* v. *President & Commissioners*, 393 U.S. 175 (1968).

In *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911), the

Interstate Commerce Commission (ICC) issued an order prohibiting Southern Pacific for a period of two years from giving a rate advantage to preferred customers. The ICC order expired before the case reached this Court. In noting the continuing nature of the controversy, this Court stated,

> The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their considerations ought not to be, as they might be, defeated by *short-term orders, capable of repetition, yet evading review,* and at one time the Government and at another time the carriers, have their right determined by the Commission without a chance of redress. (Emphasis added.) 219 U.S. at 515.

This "capable of repetition, yet evading review" standard for establishing a continuing case or controversy has been summarized as having two elements: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford,* 423 U.S. 147, 149 (1975) (*per curiam*).

Below is Chart A listing the indicia of the Article III case or controversy requirements present in this case. This chart displays the factors in the present case which support the continuing nature of the controversy.

INDICIA OF CASE OR CONTROVERSY

CHART A

Challenged Action Was In Its Duration Too Short To Be Fully Litigated

1. Only 18-months between legislative action and referendum.
2. 43-56 month average delay in Massachusets courts.
3. Even stipulated facts did not sufficiently expedite this case.

Reasonable Expectations That The Same Complaining Parties Would Be Subject To Action Again

1. Massachusetts statute is in full effect.
2. Massachusetts Supreme Court has upheld statute.
3. GIT referendum has been on ballot four times.
4. GIT Bill is presently before legislature.
5. Four plaintiffs opposed GIT in 1972; all five opposed GIT in 1976.
6. Attorney General will prosecute plaintiffs if views on GIT are made known.
7. GIT will materially affect corporate assets.
8. Plaintiffs desire to make views on GIT widely known.
9. Attorney General will not change position.

When presented in summary fashion, it is obvious that the Massachusetts statute will have a continuing broad chilling effect on the right of the plaintiffs to speak out on issues of public importance. Nor is this chilling effect limited to the plaintiffs. The statute provides that ". . . *no business corporation* incorporated under the laws of or *doing business in the Commonwealth* and no officer or agent acting in behalf of any corporation . . . *shall* directly or indirectly . . . [expend funds] . . . influencing or affecting *the vote* on any

question submitted to the voters . . ." Mass. Gen. Laws c.55 § 8. (Emphasis added.)

The very breadth of the statute makes mootness impossible. The right of both national and local corporate businesses to inform the Massachusetts public of their perspective on important issues is jeopardized by this ill-conceived attempt to isolate the business sector of the American system from the political process. In addition, the right of Massachusetts voters to hear diverse opinions on an issue so that they can be fully informed before casting their ballots shall be severely hampered.

II.

The Mootness Doctrine Should Be Narrowly Applied In Cases Involving Fundamental Freedoms

The first amendment affords the broadest protection to the discussion of public issues:

> The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. *Roth* v. *U.S.*, 354 U.S. 476, 484 (1957).

Where there is regulation of the content of speech, there is a "... need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator," *Young* v. *American Mini Theaters, Inc.*, 427 U.S. 50, 67 (1976).

When applied in the area of free expression, the mootness doctrine is particularly inappropriate. Free speech limitations, such as those imposed by the Massachusetts statute, not only curtail the rights of the plaintiffs who wish to be heard but also limit the public's

right to receive information; a right which has been accorded the strongest legal protection. "[Freedom of speech and the press] embraces the right to distribute literature . . and necessarily protects the right to receive it." *Martin* v. *City of Struthers,* 319 U.S. 141, 143 (1943). Its importance is such that, at times, courts have subordinated the more limited First Amendment rights of certain other parties to the public's right to be informed; *e.g., Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 101-02 (1973); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 390 (1969).

> Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. . . . If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 756-57 (1976). (Footnotes omitted.)

When the right of political speech is affected, the mootness doctrine has been narrowly construed. In election cases, where speech is paramount, this court has limited the application of the mootness doctrine.

In *Storer* v. *Brown,* 415 U.S. 724, 737, n.8 (1974), the impact of past elections was discussed.

> The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a

> case where the controversy is "capable of repetition, yet evading review." [Citations omitted.] The "capable of repetition, yet evading review" doctrine, in the context of election cases, is appropriate when there are "as applied" challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjucated before an election is held.

Although the referendum on the Graduated Income Tax is over, the statute lives on, chilling the speech of all corporations believed to be within the ambit of the Massachusetts statute. This limitation of free expression extends to all corporations "doing business" in Massachusetts. To allow a strained interpretation of the mootness doctrine to terminate judicial review of this frontal assault on freedom of expression will have a nationwide impact and serve to isolate the business sector of the American economy from the public.

CONCLUSION

For the reasons stated above, Pacific Legal Foundation urges the Court to reach the merits of this case.

Respectfully submitted,

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IN THE

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DIGITAL EQUIPMENT CORPORATION,
and
WYMAN-GORDON COMPANY,
APPELLANTS,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
APPELLEE.

Motion of New England Council for Leave to File Brief as Amicus Curiae and Brief of Amicus Curiae the New England Council in Support of Appellants.

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WYMAN-GORDON COMPANY,
APPELLANTS,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
APPELLEE.

Motion of New England Council for Leave to File Brief as Amicus Curiae.

Now comes the New England Council and, through its attorneys, moves this Honorable Court, pursuant to Rule 42 of the Rules of the Supreme Court, for leave to file a brief as amicus curiae in support of appellants.

The New England Council was founded in 1925 by the New England governors for the purpose of developing and strengthening the New England economy. The New England Council is financed by membership dues. The membership of the Council consists of approximately 2,000 New England individuals and business entities. These members include banks and other financial institutions, manufacturing concerns, tourist related businesses, civic associations, utilities, segments of the transportation industry, governmental agencies, professional persons and other individuals. The members of the Council range in size from among the smallest to the largest businesses. As a result, the Council is broadly representative of New England and it reflects a wide range of interests within the region.

The New England Council is particularly concerned with the decision of the Supreme Judicial Court of Massachusetts. That decision gives scant consideration to the right of members of the public, including members of the New England Council, to hear debate on an issue — an important element of the tax structure of Massachusetts — which substantially affects the New England economy. The predominant concern of the parties to the case has been and appears to be with the right of corporations under the First Amendment to speak. Little attention has been given to the effect of the decision of the Massachusetts Supreme Judicial Court in abridging the public right to hear vigorous debate on a political matter, including all points of view on a significant political and economic issue having an important impact upon New England. In addition, the New England Council believes that it is patently erroneous to uphold a legislative finding that taxation upon individuals, as an element of the overall system of taxation within Massachusetts, does not materially affect corporations. Finally, a presumption underlying the arguments in the case is that corporations

are opposed to a graduated income tax. This is not necessarily so; corporations may have differing views on the advisability of a graduated income tax or other taxes on individuals.

At this time, when the New England economy is hampered by many adverse factors, including high energy costs, a high unemployment rate, and relatively stagnant business development, it is particularly important for the public to hear all points of view on matters which may affect business decisions and consequently affect the Massachusetts and New England economy. Members of the public are entitled to be informed of the points of view of corporations so as to have an opportunity to be fully informed. This right to hear uninhibited, robust and wide-open debate, guaranteed by the First Amendment, is severely jeopardized by the opinion of the Massachusetts Supreme Judicial Court.

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v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief of Amicus Curiae the New England Council in Support of Appellants.

Introductory Statement.

The New England Council, a non-profit corporation which is broadly representative of New England interests, files this brief as amicus curiae in support of the appellants. The New England Council invites this Court's attention to the serious infringement upon the public's right to hear resulting from the enactment by the Massachusetts legislature of the statute in issue. The effect of the statute is to chill public debate upon an issue of great importance. The New England Council fears that if the legislative and judicial action in question were permitted to stand, by logical extension, the legislature could restrict the right of free speech of all forms of corporate organizations, including charities, educational, trade and special purpose associations carrying on their activities as corporations by merely finding that particular matters were not of material concern to them.

The New England Council adopts appellants' description of the opinion and the statute in issue and appellants' statement of the case.

Questions Presented.

The New England Council believes that this appeal presents, in addition to those questions set forth in the appellants' brief, the following issues:

1. Whether the action of the Massachusetts Legislature, as upheld by the Supreme Judicial Court of Massachusetts, infringes upon the right to hear of the recipients of those expressions of corporations prohibited under the statute in issue, Mass. Gen. Laws, c. 55, § 8.

2. Whether corporations have lesser rights to free speech than natural persons.

3. Whether this Court should find as a matter of law that as a part of the overall state mechanism for raising needed revenue, a tax on the income, property or transactions of individuals does materially affect the property, business or assets of corporations.

Summary of Argument.

Any intrusion upon the right of free expression is so dangerous to free and full public debate, particularly upon the right of the minority to attempt to persuade the majority, that this Court should overrule any attempt of state institutions to limit the right of parties to speak and the right of the public to hear. Particular points made in this memorandum are:

1. The right to hear free and unrestrained expression on matters of public concern is paramount. Any restriction upon free expression, however erroneous or disagreeable such expression may be, is abhorrent to the most treasured freedom upon which this country was founded. Even if it were so that matters involving the taxation of individuals do not in fact materially affect business corporations, the public has a right to know the state of mind of business corporations on this subject. If business corporations were to hold the belief that a tax on individuals has a material effect upon them, even if such a belief were erroneous, the public has a right to know because business corporations may act upon their beliefs.

2. No decision of this Court has held that corporations do not have the same rights to free speech as natural persons. On the contrary, the decided cases hold that corporations and natural persons stand upon the same footing.

3. Logical extension of the principles involved in the decision of the Supreme Judicial Court would permit legislative findings which could have the effect of stifling free speech by all forms of corporations on wide ranges of subject matters.

4. The decision of the Supreme Judicial Court, along with the history of the controversy concerning a graduated income tax, appears to presume that corporations would spend

huge sums of money in opposing a graduated income tax. This presumption is not necessarily valid, particularly when it is considered that the statute in question affects not only large, wealthy and publicly held corporations, but it also affects the large number of closely held and family corporations which carry on business within the Commonwealth of Massachusetts. Such corporations are particularly affected by tax on individuals.

5. The legislative finding that a tax on individuals does not affect business corporations is on its face incorrect since taxation of individuals is one element of the scheme for raising revenue of the Commonwealth every element of which affects every other element.

Argument.

I. *Preliminary Statement.*

The New England Council has filed this brief as amicus curiae so as to present to the Court the point of view of a broadly representative New England organization, and particularly, to emphasize the public's right to hear debate on issues substantially affecting the New England economy.

The New England Council was organized in 1925 by the governors of the six New England states for the purpose of working to develop and strengthen the economy of New England. The Council has approximately 2,000 members, both individuals and business entities, from the six New England states. It maintains a principal place of business in Boston, Massachusetts, and its operations are financed by membership dues. The Council is broadly representative and reflects the interests of the region.

The membership of the New England Council is made up of approximately 300 banks and other types of financial institutions, 600 manufacturing businesses, 200 tourist

related businesses, over 75 civic associations, utilities, segments of the transportation industry, governmental agencies, professional persons and other individuals. The businesses represented range in size from among the smallest to the largest.

The New England Council is particularly concerned with the possible extension of the principle, which it would appear has been upheld by the Massachusetts court, that the legislature may make a finding as to what speech has a material effect upon corporations and may restrict the speech of corporations on those matters which the legislature finds to have no material effect. This principle, if upheld, would not necessarily be restricted to business corporations and could be applied to all corporations, including charitable corporations, educational institutions, various special purpose organizations carrying on their activities as corporations, and, possibly, other entities created by the Commonwealth.

II. *The Right to Receive Information.*

The state court failed to consider the right of the public to receive the information which would result from expenditures or contributions by appellants and other corporations. See, Appendix, Jurisdictional Statement ("AJS") 9-15. It is well established that the First Amendment creates the right to receive information in addition to the right to communicate. "The right of freedom of speech and press includes . . . the right . . . to receive, the right to read . . ." *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965). This point was recently emphasized in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), establishing the right of the public to receive advertising information concerning the price of prescription drugs. In so holding this Court stated:

> "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases." 425 U.S. at 756.

The right to receive information has been recognized in a broad range of contexts. In *Procunier* v. *Martinez,* 416 U.S. 396 (1974), this Court recognized the right of individuals desiring to communicate with prisoners to receive the information which would be contained in the writings of the prisoners. In so holding this Court stated:

> "Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication." 416 U.S. at 408-09.

The public's right to receive information has also been recognized in a decision upholding the Federal Communication Commission fairness doctrine which requires television and radio stations to provide reply time to individuals and organizations disagreeing with their editorials. In *Red Lion*

Broadcasting Co., Inc. v. *F.C.C.,* 395 U.S. 367 (1969), this Court stated:

> "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. [citations omitted.] It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the F.C.C." 395 U.S. at 390.

The First Amendment right to know has also been recognized in the context of preventing censorship of literature. In *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), the Court recognized the right of the public to receive foreign literature without the chilling effect of a requirement to register with the post office. This point was re-emphasized in a recent decision by the United States Court of Appeals for the Sixth Circuit which prevented a local school board from banning the discussion of certain books in high school classes and eliminating such books from the school library. *Minarcini* v. *Strongsville City School District,* 541 F.2d 577 (6th Cir. 1976). In *Minarcini* the court relied heavily on *Virginia State Board of Pharmacy* v. *Virginia Consumer Council, Inc., supra,* in finding that the First Amendment protection of the right to know prevented the school district from banning the discussion of various publications in classes. The right to receive information and ideas is "fundamental to our free society" and exists "regardless of"

the "social worth" of the information and ideas.[1] *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969).

The right to receive information is particularly important in situations, as in the instant case, in which the restriction affects political speech. This Court has recognized that "[t]he public interest in having free and unhindered debate on matters of public importance" is "the core value of the Free Speech Clause of the First Amendment." *Pickering* v. *Board of Education,* 391 U.S. 563, 573 (1968).[2] In *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966), the Court stated "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." Similarly, in *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964), the Court held "speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, . . ." It is with these cases in mind that a district court recently stated, "[f]ree debate on public issues is essential to the survival of the Republic. It hardly needs repeating that such speech should be 'uninhibited, robust and wide-open.'" *Vanasco* v. *Schwartz,* 401 F.Supp. 87, 97 (S.D.N.Y. 1975), *aff'd,* 423 U.S. 1041 (1976). This point was again emphasized in the context of political campaigns in *Buckley* v. *Valeo,* 424 U.S. 1, 14 (1975), where this Court recognized

[1] The "ideas and information" protected in Stanley were obscene films. It would seem that the right to receive word of business corporations' perception of the effect of a tax on individuals would be at least as important as the right to hear obscene matter.

[2] See, *e.g.,* A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948).

that discussion of political affairs is "an area of the most fundamental First Amendment activities" and "[d]iscussions of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."

In *Pickering* v. *Board of Education, supra,* this Court held that the First Amendment protected the right of a school teacher to express his opinion on the wisdom of approving a bond issue for educational purposes:

> "On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." 391 U.S. at 571-72.

Similarly, the appellants and other Massachusetts corporations have a special insight into the effect that political choices may have on businesses located in Massachusetts or contemplating expansion in Massachusetts. It is particularly harmful to the public to deprive it of the information which such businesses may wish to give and which may affect the public. Appellants employ a large number of individuals who would be affected by a graduated income tax. They also employ professional economists who have studied the effect of a graduated income tax. AJS. 32-38, 42. The effect that political decisions, such as the institution of a graduated income tax, have on corporations is certainly a matter of concern to voters. Likewise, the corporate perception of such an effect is also of significant public interest. Citizens of Massachusetts, including members of the New England Council, are concerned with the economic impact of

political decisions on corporations which have the resources to provide jobs and strengthen the tax base of the Commonwealth. Therefore, voters have a vital interest in receiving communications from the appellants and other business corporations on issues upon which corporations are willing to expend time and money to communicate their views.

The public's right to receive such information exists regardless of whether the Massachusetts legislature deems that a particular issue has a material effect upon the property, business or assets of corporations. If corporations perceive that the institution of a graduated income tax on individuals will create an unfavorable business climate in Massachusetts that perception may affect their decisions on expanding or even maintaining their operations in Massachusetts. The electorate is entitled to be apprised of the concerns of corporations in order to make informed decisions on public affairs.

Even if it were so that a graduated income tax on individuals would not in fact materially affect the interests of corporations, there would be no justification for preventing the public from hearing the exposition of the point of view of corporations. It is not relevant to First Amendment considerations whether a speaker's views are accurate. In his concurring opinion in *Virginia Pharmacy Board v. Virginia Consumer Council, Inc., supra,* Mr. Justice Stewart drew a distinction between commercial price and product advertising, as to which factual accuracy may be required, and ideological communications, as to which such accuracy need not be required. Mr. Justice Stewart said:

> "Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought — thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decision-making, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. Indeed, disregard of the 'truth' may be employed to give force to the underlying idea expressed by the speaker. 'Under the First Amendment there is no such thing as a false idea,' and the only way that ideas can be suppressed is through 'the competition of other ideas.'" 425 U.S. at 779-80.

The public, including members of the New England Council, are entitled to hear "the competition of ideas" between the economists representing the appellants and economists with opposing views.[3]

The approach of the Massachusetts legislature in seeking to keep the public in ignorance of the position of corporations on political issues out of fear that the presentation of the corporate point of view will unduly influence the electorate is repugnant to the First Amendment. As the Supreme Court stated in *Virginia Pharmacy Board v. Virginia Consumer Council, Inc., supra*:

> "There is, of course, an alternative to this highly paternalistic approach. [preventing pharmacists from advertising the price of prescription drugs.] That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interest if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is pre-

[3] Compare AJS. 32-38 with AJS. 47-48.

cisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." 425 U.S. at 770.

To the extent that the decision of the Supreme Judicial Court was premised upon the notion that the relative voices of corporations and private citizens in the electoral process should be equalized, such a position runs contrary to the decision of this Court in *Buckley v. Valeo, supra.* In holding that placing a monetary limit on the amount an individual or group could expend in voicing their views in political campaigns violated the First Amendment, this Court stated:

> "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources,"' and '"to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"'." [citations omitted]. 424 U.S. at 48-49.

Other courts which have considered whether barring corporations from making contributions or expenditures on referendum questions violates the First Amendment have relied in part on the *Buckley* opinion in concluding that such restrictions violate the First Amendment. See, *e.g., C & C Plywood Corp. v. Hanson,* 420 F.Supp. 1254 (D. Mont. 1976), *appeal docketed,* No. 76-3118, 9th Cir., Sept. 29, 1976; *Advisory Opinion on Constitutionality of 1975 PA 227,* 396 Mich. 465, 242 N.W.2d 3 (1976); *Pacific Gas & Electric Co. v. Berkeley,* 60 Cal. App.3d 123, 131 Cal. Rptr. 350 (1976).

The justification which exists for preventing corporations from participating in the election of candidates to public office is inapplicable to campaigns on referendum questions. See, *e.g., Schwartz v. Romnes,* 495 F.2d 844 (2nd Cir. 1974); *C & C Plywood Corp. v. Hanson, supra*; *Advisory Opinion on Constitutionality of 1975 PA 227, supra*; *Pacific Gas & Electric Co. v. Berkeley, supra.*[4] In *Romnes,* the court recognized that the primary reason for prohibiting corporate contributions or expenditures in elections is "to prevent corruption of legislators and other elected officials" and that this rationale was inapplicable to contributions in connection with referenda questions.

> "Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions

[4] Schwartz v. Romnes involved a derivative suit to recover a $50,000 expenditure made by a corporation with respect to a state bond issue submitted for a referendum vote. The court held that the New York statute banning corporate contributions and expenditures for political purposes did not ban contributions in connection with referendum votes because such an interpretation would violate First Amendment rights. In Advisory Opinion on Constitutionality of 1975, PA 227, the Michigan Supreme Court answered questions propounded by the House of Representatives concerning the constitutionality of proposed election laws. The court held that a provision barring corporations from making contributions or expenditures on ballot questions violated the First Amendment. In C & C Plywood Corp. v. Hanson, several corporations brought a suit seeking a declaratory judgment that a provision of the Montana Code which barred corporations from making contributions or expenditures with respect to referendum questions was unconstitutional. The district court held that the statute violated the First Amendment. In Pacific Gas & Electric Co. v. Berkeley, an electric utility sought declaratory relief from the operation of a city ordinance prohibiting corporations from making contributions to influence the outcome of referenda. After finding that the ordinance violated the First Amendment, the court enjoined the enforcement of the ordinance.

to a public referendum. The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights." 495 F.2d at 852-53.

As a result, the court construed a provision of New York law banning corporate contributions not to apply to contributions in support of positions on a referendum so as to find the provision in question constitutional and not an abridgement of First Amendment rights.

> "There is even greater cause for constitutional concern in the present case, for the plaintiff's broad construction of § 460 would proscribe corporate contributions or expenditures for the purpose of communicating its views to the public with respect to an important issue to be decided by the voters and furnishing information that might be of assistance in arriving at that decision." 495 F.2d at 852.

Similarly, the Michigan Supreme Court in issuing an advisory opinion on the validity of proposed legislation to ban corporate contributions in both elections and referenda drew a distinction between referenda and elections, stating,

> "It is our opinion that corporate contributions or expenditures for the purpose of influencing the nomination or election of a candidate may be constitutionally prohibited in order to preserve the integrity of the electoral process. However, we would view the prohibition of corporate contributions or expenditures for the purpose of influencing the qualification, passage, or defeat of a ballot question as an unconstitutional abridgement of freedom of speech and press as guaranteed by art. 1, § 5." *Advisory Opinion on Constitutionality of 1975 PA 227*, 242 N.W.2d at 18.

In reaching this decision the court was concerned with the public's right to hear the corporate point of view. The court stated:

> "It is our opinion that insofar as § 95 interferes with the right of the public to hear divergent views of public importance by prohibiting corporations from making contributions or expenditures for the purpose of communicating its opinion concerning ballot questions, it is violative of Const. 1963, art. 1, § 5." 242 N.W.2d at 19.

In *C & C Plywood Corp. v. Hanson, supra,* the court held that an amendment to the Montana Code which banned corporate expenditures and contributions on ballot questions violated the First Amendment. In so holding, the court identified as a crucial factor "the electorate's right to be informed on public issues; the very essence of self-government and intelligent decision-making." 420 F.Supp. at 1261-62. After considering this factor, the court held:

> "Therefore, . . . the State of Montana cannot constitutionally legislate a direct prohibition on the exchange of ideas and information, involved in one form of the legislative process, merely because the source of the information is a corporation." 420 F.Supp. at 1265.

As these cases show, protection of the public's right to uninhibited, robust and wide-open debate requires reversal of the decision of the Supreme Judicial Court of Massachusetts and a declaration that the statute in issue is unconstitutional as repugnant to the First Amendment.

III. *Corporations Have the Same First Amendment Rights as Natural Persons.*

The proposition that corporations have lesser First Amendment rights than natural persons is not supported

by the decisions of this Court. While a distinction between corporations and natural persons has been drawn under the privileges and immunities clause, no such distinction is applicable to First Amendment rights to political expression.[5]

Grosjean v. American Press Co., 297 U.S. 233 (1936), held that a corporation is a "person" within the meaning of the equal protection and due process clauses of the Fourteenth Amendment. Similarly, *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), upheld a corporate employer's First Amendment rights. In one of the most recent decisions by this Court arising out of the regulation of campaign expenditures, *Buckley v. Valeo, supra*, two of the plaintiffs were corporations.

After having struggled over the years with the question of whether restrictions upon commercial speech were contrary to First Amendment rights, e.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942), this Court has now made it clear

[5] Decisions of this Court, Hague v. C.I.O., 307 U.S. 496 (1939), Western Turf v. Greenberg, 204 U.S. 359 (1907) and Northwestern Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243 (1906), restricting the applicability to corporations of the due process clause of the Fourteenth Amendment, do not decide the issue of whether corporations are entitled to First Amendment protection with respect to political expression. While, in Hague, the American Civil Liberties Union, a corporation, was dismissed as a plaintiff in an action challenging a municipal ordinance as an unconstitutional restriction of the right to free speech, the court dealt only with the privileges and immunities clause in its analysis of the corporation's rights. Neither the Western Turf nor Northwestern National Life Insurance case involved First Amendment claims. The former dealt with a state statute concerning life insurance and the latter with a statute concerning admission to places of public amusement. Pierce v. Society of Sisters, 268 U.S. 510 (1925), relied on by the Massachusetts Supreme Judicial Court, involved a state regulation challenged on the basis of the threat it posed to petitioners' business and patrons and presented no claim as to intereference with corporate rights of free speech. The rationale applied in the above-mentioned cases has been eroded in the context of First Amendment rights by subsequent decisions of this Court reviewed herein.

that commercial speech is protected. *Linmark Associates, Inc. v. Willingboro*, — U.S. —, 45 U.S.L.W. 4411 (May 2, 1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra; Bigelow v. Virginia*, 421 U.S. 809 (1975); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

Several recent lower court decisions, some of which were cited in the preceding section, have determined that corporations have First Amendment rights to express their opinions in connection with matters of political or public significance. See e.g., *Schwartz v. Romnes, supra,* (corporation expenditures on referendum question protected);[6] *C & C Plywood Corp. v. Hanson, supra,* (corporation contributions on public ballot issues protected);[7] *Fram v. Yellow Cab Co. of Pittsburgh,* 380 F.Supp. 1314 (W.D. Pa. 1974) (no basis for claim that First Amendment does not apply to corporations);[8] *Advisory Opinion on Constitutionality of 1975 PA 227, supra,* (corporation expenditures on public ballot questions entitled to protection);[9] *Borough*

[6] Schwartz involved a stockholders derivative suit against directors of a corporation arising from expenditures made by the corporation in connection with a public referendum issue. The court stated that state interests in prohibiting corporate contributions in connection with referenda did not warrant the encroachment on First Amendment rights. 495 F.2d at 852-53.

[7] A provision of the Montana Corrupt Practices Act prohibiting corporate payments and contributions in support of or in opposition to public ballot issues was held unconstitutional on the ground that a state may not prohibit the exchange of ideas and information where the source of the information is a corporation.

[8] Fram involved an action for slander brought against a corporate competitor where the court held that there was no basis for plaintiff's contention that the First Amendment did not apply to corporations. 380 F.Supp. at 1334.

[9] The Supreme Court of Michigan stated in this case that a significant distinction exists between corporate contributions to candidates and corporate expenditures made in connection with public ballot issues and that the latter type of expenditures are entitled to constitutional protection.

of Collingswood v. Ringgold, 66 N.J. 350, 331 A.2d 262 (1975) (speech of corporate entity protected);[10] *Pacific Gas & Electric Co. v. Berkeley, supra,* (ordinance prohibiting contributions by corporations in connection with referendum unconstitutional).[11]

Protection of expression on matters of political and public interest is fundamental. If one entity is prevented from expressing itself solely because it is a corporation, there is grave danger that restrictions upon the free expression of ideas may be applied to other entities. Charities may be limited in their expressions to matters which the legislature deems to be within their charitable purposes; special interest groups receiving contributions and conducting their affairs as corporations may be subjected to legislative determinations as to matters upon which they may appropriately speak; even an organization such as the A.C.L.U. conceivably could be limited in its freedom of expression. The power of the legislature may not be used to silence opposition, to suppress minority viewpoints. Such limitation on free speech cannot be tolerated.

The conclusion by the Massachusetts Supreme Judicial Court that corporations possess certain rights of speech and expression under the First Amendment but that corporate freedom of expression may be limited to political issues materially affecting corporate business, property or assets is contrary to principles established by this Court. Where "core First Amendment rights of political expression" are abridged, the governmental interests supporting

[10] The court upheld the validity of a municipal ordinance regulating commercial solicitation but stated that speech is not unprotected because it is uttered by a corporate entity and because it serves the economic purposes of that entity. 331 A.2d at 270.

[11] The court in Pacific Gas invalidated a municipal ordinance which prohibited corporations from contributing to any committee which attempted to influence the public in connection with referenda issues as a violation of the First Amendment rights of corporations.

such regulation must satisfy "exacting scrutiny." *Buckley v. Valeo*, 424 U.S. at 44. As this Court stated in *Mills v. Alabama*, 384 U.S. at 220, and reaffirmed in *Buckley v. Valeo*, 424 U.S. at 50, "no test of reasonableness can save a state law [abridging First Amendment rights] from invalidation as a violation of the First Amendment. . . ."

IV. *A Tax on Individuals Materially Affects Corporations.*

In enacting Mass. Gen. Laws c. 55, § 8, the Massachusetts legislature presumed that issues related solely to the taxation of individuals do not "materially affect the property, business or assets of the corporations." Similarly, in concluding that Mass. Gen. Laws c. 55, § 8 was valid, the Supreme Judicial Court relied on the lack of "an express finding that the plaintiffs' material interests would in fact be affected by the ballot question." AJS. 14. That conclusion is contrary to the undeniable and self-evident fact that a tax on individuals affects corporations. The ability of corporations to attract qualified executives, the funds available to consumers, monies on deposit in appellants' banks are all matters dealt with in the record. However, no record is needed to conclude that a state's mechanism for raising needed revenue affects all taxpayers and potential taxpayers.

In raising tax revenue, a state or municipality necessarily relies upon various sources. To the extent that a system of taxation generates more revenue from one segment of society, a corresponding reduction results in the amount of revenue which must be raised from other sources. Thus, if a state could raise its needed revenues entirely from taxation of individuals, it could decide not to tax corporations at all. Conversely, if a state were to decide to generate less revenue from the taxation of individuals, the burden of meeting a state's fiscal needs could be shifted

to corporations. It cannot be denied that decisions on the allocation of the tax burden have a material effect on corporations as entities which, as a result of such decisions, may bear greater or lesser degrees of the total tax burden.

In addition, the rate of taxation on individuals would probably affect investment by individuals in corporations. For example, by lowering the tax rates of individuals, the legislature would free additional revenue which could be used for investment, thereby facilitating capital formation in corporations, an important factor for small or medium-sized corporations. Also, small closely held corporations would be affected by the tax rate on individuals because such a tax would affect, among other matters, decisions on payments of dividends or accumulation of capital or, even, the purchase and sale of businesses.

The effect of individual income tax rates on small and medium-sized corporations illustrates an erroneous assumption underlying this case. The case has proceeded on the assumption that corporations oppose the graduated income tax. However, this is not necessarily so. Small corporations or corporations whose shares are held largely by out of state shareholders may welcome the relief from the tax burden imposed upon them by the adoption of a tax system imposing a heavier burden upon individual taxpayers. Corporations owning property may welcome relief from the burden imposed upon them by the property tax if there were heavier reliance upon an income tax on individuals to raise needed state revenue. These are only illustrations of the variety of views that corporations may hold on taxes on individuals. These illustrations are offered to show why corporations should not be prohibited from expressing their opinions on matters affecting the system of taxation of the state within which they function.

The potential impact of individual income tax rates on small corporations and the general effect of such tax rates on incentives for investment materially affect the assets of such corporations. The conclusion of the Massachusetts legislature is contrary to this plain irrebuttable principle.

Conclusion.

It is evident from the record that this case is one more battleground in the ongoing controversy concerning the establishment of a graduated income tax in Massachusetts. The legislature, which has consistently favored a graduated income tax, has attempted to silence what it perceives to be the opposition through the adoption of a criminal penalty for speaking on the subject. This circumstance should not distort the important principles at issue here. The issue is not one of pro-graduated income tax or anti-graduated income tax; the issue is whether a state legislature may silence debate among its citizenry.

The assumption that corporate wealth would be used in opposition to a graduated income tax is simply not correct since that assumption neglects the existence of many diverse types of corporations including small closely-held corporations, family corporations, professional corporations and the like. That any element of the scheme of taxation adopted by a state to raise revenue materially affects all taxpayers and potential taxpayers in the state is uncontrovertible. The record below shows that at least some economists believe a tax on individuals materially affects corporations, and that, whether correctly or not, corporations perceive the tax on individuals as affecting them. These factors and the arguments bearing upon them may operate as a distraction from the fundamental issue in this case — whether there is any justification permitting a state to si-

lence the voice of one of its citizens and, in so doing, to deprive its citizens of the right to hear the opinions, positions and ideas of a segment of the citizenry.

This brief has not dealt with the issue of mootness, an issue briefed at length by the parties. However, the New England Council wishes to invite the Court's attention to the already chilling effect on public debate which the circumstances leading to this case have had, and the dangerous potential, absent a decision in this Court, for further state action attempting to silence voices within the Commonwealth. Under such circumstances, a firm pronouncement by this Court upholding the First Amendment is necessary at this time so as to make certain that action by this or any other state to silence the opposition by making it a crime to speak will not be permitted.

Respectfully submitted,

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